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# Legally Defensible vs. Organizationally Sensible: Avoiding Legal-Centric Employment Decision Making

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# Legally Defensible vs. Organizationally Sensible: Avoiding Legal-Centric Employment Decision Making

## **Abstract**

Managers and human resource professionals express grave concern about the increasing influence that the law and lawyers are having on their ability to manage employees effectively. Blame is typically placed on growing governmental regulation of the employment relationship, a “litigation mentality” among workers, and overly aggressive lawyers pursuing selfish interests. Much less common, however, is attention focused on the role that organizational decision makers play in contributing to the perceived problem. This article is intended to help address that limitation by alerting managers to the likelihood that they are unnecessarily contributing to the impact of legal considerations on the management of employees as a result of “legal-centric decision making”, and by providing information and guidance that will assist them in formulating better informed, more strategic responses to employment issues that have potential legal implications. Keys to implementing the strategic approach are identified and discussed, and the approach is illustrated by applying it to a decision that American employers continue to confront: how to respond to the eroding employment at-will doctrine. The analysis strongly suggests that the extent of the law’s negative influence on the management of employees can be moderated significantly if organizational decision makers recognize their contribution to “the problem”, focus on what is organizationally sensible rather than what is perceived to be legally defensible, and adopt a more strategic (less legal-centric) approach to the challenges posed by employment decisions that raise legal concerns.

## **Keywords**

manage, professionals, law, lawyer, employee, work, problem, organization, legal, interest

## **Comments**

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WORKING PAPER SERIES

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Working Paper 02 - 18



# **Legally Defensible vs. Organizationally Sensible: Avoiding Legal-Centric Employment Decision Making**

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This paper has not undergone formal review or approval of the faculty of the ILR School. It is intended to make results of Center research available to others interested in preliminary form to encourage discussion and suggestions.

### **Abstract**

Managers and human resource professionals express grave concern about the increasing influence that the law and lawyers are having on their ability to manage employees effectively. Blame is typically placed on growing governmental regulation of the employment relationship, a “litigation mentality” among workers, and overly aggressive lawyers pursuing selfish interests. Much less common, however, is attention focused on the role that organizational decision makers play in contributing to the perceived problem. This article is intended to help address that limitation by alerting managers to the likelihood that they are unnecessarily contributing to the impact of legal considerations on the management of employees as a result of “legal-centric decision making”, and by providing information and guidance that will assist them in formulating better informed, more strategic responses to employment issues that have potential legal implications. Keys to implementing the strategic approach are identified and discussed, and the approach is illustrated by applying it to a decision that American employers continue to confront: how to respond to the eroding employment at-will doctrine. The analysis strongly suggests that the extent of the law’s negative influence on the management of employees can be moderated significantly if organizational decision makers recognize their contribution to “the problem”, focus on what is organizationally sensible rather than what is perceived to be legally defensible, and adopt a more strategic (less legal-centric) approach to the challenges posed by employment decisions that raise legal concerns.

## **Legally Defensible vs. Organizationally Sensible: Avoiding Legal-Centric Employment Decision Making**

The core responsibilities of most managerial positions include decision making with regard to people. Decisions must be made about who and how to hire, train, reward, discipline, and retain or terminate employees. These decisions take place in the context of an organization seeking to provide an adequate return to shareholders, provide valued products and/or services to customers, and do so all within a broader political/legal context that is often uncertain. Ideally, decisions about people should consider all of the relevant constituencies, constraints, and potential outcomes, but increasingly such decisions seem to be influenced by legal considerations. Managers claim that the threat of litigation is a pervasive constraint on their ability to manage employees effectively, human resource professionals view employment law as an increasingly overly restrictive influence on their profession, and commentators argue that the threat of employment litigation is having a paralyzing effect on the American workplace that undermines the international competitiveness of U.S. companies<sup>1</sup>.

Explanations for the increasing impact of legal considerations on employment decisions typically point a blaming finger at growing governmental regulation of the employment relationship, a “litigation mentality” among workers, and overly aggressive lawyers pursuing selfish interests<sup>2</sup>. Much less common, however, is attention focused on the role that organizational decision makers play in contributing to the perceived problem. This article is intended to help address that limitation. Its primary purposes are to alert managers to the likelihood that they are unnecessarily contributing to the impact of legal considerations on the management of employees as a result of “legal-centric decision making”, and to provide information and guidance that will assist them in formulating better informed, more strategic responses to employment issues that have potential legal implications. A fundamental premise of this article is that as a result of the legal-centric decision making of many managers and human resource professionals, legal considerations are having a negative impact on

employment decisions that not only goes beyond what the law requires, but frequently exceeds what can be reasonably justified when the full range of legitimate factors, both legal and non-legal, are taken into account.

The remainder of this article is organized in three sections. It begins with a discussion that focuses on legal-centric decision-making in employment matters: What is it? Why is it problematic? What factors contribute to its frequent occurrence? The second section provides information and practical advice aimed at promoting better informed decisions regarding employment issues that raise legal concerns. A strategic approach to such issues is presented and contrasted to the legal-centric approach, and keys to implementing the strategic approach are identified and discussed. The final section illustrates the recommended strategic approach by applying it to a decision that American employers continue to confront: how to respond to the eroding employment at-will doctrine.

### **Legal-Centric Decision Making Regarding Employment Matters**

#### What is Legal-Centric Decision Making?

The term legal-centric decision making refers to decision making that does not involve legal requirements (i.e., a specific course of action is not mandated by law), but which gives primacy to legal considerations to the extent that other organizationally relevant, non-legal considerations are essentially ignored. An example of a legal-centric decision would be a decision to require employees to sign written agreements acknowledging that they can be “terminated at any time, with or without cause, and with or without notice” that is made by an employer without consideration of how the policy aligns with the company’s espoused values (e.g., “Employees are our most valuable resource”) or other non-legal considerations (e.g., the effect of the policy on recruiting and retention efforts). Other examples of legal-centric decisions relating to employment matters are provided in Table 1. Each example involves a decision regarding which the law does not require a specific course of action, thus, the organizational decision maker was free to consider a wide range of non-legal factors (e.g., espoused company

values, impact on employee productivity, interpersonal civility) beyond just the threat of potential litigation. However, in each example, the decision that was reached was driven by legal considerations, and non-legal considerations were essentially ignored.

Of course, there are occasions when managers are called upon to address employee related concerns that do involve strict legal requirements. For example, in the United States federal safety laws prescribe and prohibit a variety of specific practices, and employer compliance with these provisions is mandatory. The distinction between employment matters involving clear and specific legal requirements, and employment matters that do not involve such requirements but which merely may have potential legal implications (e.g., litigation risk) is a critical one, and therefore, we will return to it in the next section. For now, it should be understood that the phenomenon we refer to as legal-centric decision making does not include “decisions” strictly mandated by law.

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Insert Table 1 about here.

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In addition to essentially ignoring non-legal considerations, a secondary characteristic of legal-centric decision making is that in focusing on legal considerations, emphasis is placed on the generation of evidence or “proof” that will assist the employer in defending against particularly salient litigation claims. The full range of potential litigation claims is typically not systematically assessed, and little or no attention is given to the effect of the decision on underlying, more systemic problems that may exist (e.g., a discriminatory workplace climate, subjective practices that allow biases to be manifested in employment decisions).



Why is Legal-Centric Decision Making Problematic?

“[A]s managerial decisions are increasingly dominated by a concern for what is legally defensible, they necessarily shift concern away from what makes organizational sense.”<sup>3</sup>

The fundamental danger associated with legal-centric decision making is that its focus on what is legally defensible occurs at the expense of other legitimate criteria for organization performance (e.g., financial performance, alignment with espoused company values, ethical obligations), leading to decisions that may undermine the overall effective management of employees. For example, there is evidence that some employers forego the use of human resource management practices with demonstrated links to improved productivity (e.g., selection tests) because of concerns that the use of the HR practice might provide disappointed employees or job applicants some basis to pursue a legal claim<sup>4</sup>. The unnecessarily myopic focus on legal concerns also may lead to the prolonged failure to remove manifestly incompetent or disruptive work team members, and to employment policies that contribute to employee cynicism by “flying in the face” of espoused organizational values.

Legal-centric decision making’s characteristic focus on a specific, salient litigation concerns and generating favorable evidence that can be used in court not only threatens to undermine the effective management of employees, it may also contribute to a net increase in the risk of employee litigation. There are three distinct ways in which legal-centric decision making may lead to this ironic outcome. First, some decisions that are made with a focus on addressing a specific, salient litigation concern, actually increase the risk of other less salient litigation risks. For example, concerns regarding the threat of civil liability due to fetal exposure to toxins in the workplace led some employers to preclude female employees of child-bearing age from certain jobs that were considered high risk. While this decision may have decreased the employer’s risk of tort liability due to fetal exposure to toxins in the workplace, it increased the risk of sex-based employment discrimination claims by female employees<sup>5</sup>. More recently, some employers concerned about the threat of sexual harassment claims have adopted policies

discouraging socializing between men and women as a way of reducing the risk of sexual harassment claims. Such a policy may mitigate the focal legal concern (i.e., liability for sexual harassment). However, it has been observed that by proactively impeding informal interactions between male and female employees, the policy may impede the career networking opportunities of women, contributing to the perpetuation of “old boy networks”, and leading to an increased risk of sex discrimination claims by female employees<sup>6</sup>. Finally, as we will discuss in greater detail below, there is reason to believe that the aggressive steps that American employers are taking to avoid claims that employees can only be discharged for “good cause” are creating a greater risk of potentially much more costly illegal employment discrimination claims.

Second, the reciprocal nature of social interactions suggests that legal-centric decisions may increase an employer’s risk of employment litigation by contributing to a legalistic workplace climate, which in turn, increases the likelihood that employees will adopt legalistic responses to grievances experienced at work. Because people tend to respond in kind to the way they are treated, highly legalistic employer policies, practices, and behaviors that result from legal-centric decision making can be expected to have the tendency to bring about legalistic responses on the part of aggrieved employees (e.g., consulting an attorney, pursuing a claim through an external agency or the courts). A poignant example of this tendency is provided by a case involving Heather (not her real name), a 20 year-old female employee who became very distraught when a manager’s romantic interests became increasingly aggressive, and then hostile toward her. She sought to address her concern through the company’s relatively informal, internal procedure. The company’s investigation revealed undisputed evidence of sexually harassing behaviors (a stack of e-mail messages from the harasser), and when confronted with evidence, the harasser did not offer a rebuttal. At this point the senior manager in charge of the investigation apologized to Heather on behalf of the company, and sought her input regarding what she thought would be a fair resolution of the situation. Although

Heather did not want the harasser to lose his job, she did not feel that she could continue to work with him. It was decided that the harassing employee would be suspended without pay and required to receive appropriate counseling, and at Heather's request, she would receive a lateral job reassignment and short-term financial support for counseling. These terms were viewed as fair and reasonable to all involved, including Heather and the harasser.

Before implementing the informal agreement, the manager in charge thought it would be prudent to "run it by legal." The lawyer who was consulted agreed that Heather's request for short-term support for counseling and a transfer was not only reasonable, but quite modest under the circumstances. He insisted, nonetheless, that Heather provide a signed release of any and all legal claims that she might have against the company arising out of the harassment incident. Both surprised and alarmed in the shift from an informal, joint problem solving approach to what she perceived was a very formal, adversarial one, Heather consulted an attorney. The attorney cautioned Heather about signing any type of formal release before the full extent her current and potential future damages was thoroughly evaluated. The attorney was retained and the matter headed down a path toward litigation. In the end, by ignoring interpersonal considerations and civility, and insisting on a formal legal release, the company's legal-centric decision prompted a legalistic response from Heather, increasing the likelihood that the company's fear of employee litigation would be realized.

Third, legal-centric decision making may lead to an increased risk of employee litigation because its sole focus on salient litigation threats and generating favorable evidence may inadvertently or purposefully divert attention from underlying, systemic problems that contribute to employee litigation. For example, some employers consciously refrain from collecting data that might reveal racial or gender problems, or otherwise do not engage in self-evaluation, because of the concern that the information could be used (at a later date) by a rejected applicant or aggrieved employee to establish a claim of employment discrimination. Similarly, some employers sanitize employee files to eliminate all documents that have the potential to be

harmful if litigation arises, without regard for the relevance of the information to performance management concerns or the potential identification of patterns of biased decision making<sup>7</sup>. Where there are systemic problems that contribute to employee litigation, following a legal-centric approach is like treating cancer by taking medication to preemptively avoid anticipated episodes of pain associated with the cancer. In the short term, episodes of pain may be lessened, or even avoided in some instances. The underlying cancer, however, is permitted to fester, typically increasing the intensity and scope of its negative affects on the patient's well being.

In summary, legal-centric decision making is problematic because it is dominated by perceptions of what is legally defensible rather than concern for what is organizationally sensible, and as a result, it poses a serious threat to the organization's overall effective management of employees. Moreover, there is reason to expect that over time, the cumulative effect of legal-centric decision-making may lead to a greater threat of employee related litigation than would be the case if a more balanced or strategic approach to employment decisions with legal implications was adopted.

#### Primary Factors and Conditions Contributing to Legal-Centric Decision Making

Why do managerial decision-makers go beyond the requirements of the law to emphasize legal considerations to the extent that non-legal considerations are essentially ignored? Further, in emphasizing legal considerations, why do decision-makers focus on particularly salient litigation threats, typically failing to systematically assess the net effect of the contemplated decision on the risk of litigation, and paying little or no attention to systemic conditions that contribute to the risk of litigation? Fully explicated answers to these questions would require a lengthy discussion of a wide range of psychological, social, and institutional factors. However, parsimonious answers may be provided by focusing on three factors that are thought to be proximately related to legal-centric decisions making: 1) the cognitive limits of decision makers, 2) decision maker pursuit of self-interest, and 3) the biased perspective and

dominant role of lawyers. As Figure 1 suggests, the extent to which these primary factors operate to produce a legal-centric decision varies depending on the degree to which the decision at hand is perceived as involving uncertain legal requirements, uncertain outcomes (e.g., the risk of litigation), or uncertain roles for the individuals involved in the decision making process. Generally, the greater the perceived uncertainty associated with the contemplated decision, the more likely it is that cognitive limits, self-interest, and the input of lawyers will lead to a legal-centric decision.

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Insert Figure 1 about here.

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Cognitive biases and departures from rational decision making. Rational choice theories of decision making posit that decision makers are maximizers who conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal methods of achieving their goals (i.e., maximizing net benefits). Managers following a purely rational approach and pursuing the best interest of their employer would first determine if the contemplated employment decision involved legal requirements. If the matter involved clear and specific legal requirements, then the course of action would be dictated by the requirements of the law. If it is determined that the contemplated matter merely involved potential legal implications, and not strict legal requirements, then the various alternatives for addressing litigation threats and relevant non-legal considerations would be systematically identified and evaluated, and a decision made that would maximize the net utility to the employer.

Legal-centric decision-making would not occur if managers both followed purely rational models of decision-making and never pursued their self-interest at the expense of their employer's best interest. However, it is now well understood that managers have neither unlimited cognitive capacity nor unlimited resources to address the issues that may confront

them. As a result, managerial decision-making frequently departs from rational decision-making leading to sub optimal choices among competing options. Such departures may result, in part, from mental processes that operate at a subconscious level. In particular, research has demonstrated decision makers faced with cognitively demanding decisions invoke simplifying heuristics, or mental shortcuts, that result in a number predictable decision making biases. Several of these biases contribute to legal-centric decision making's focus on litigation threats.

Availability bias refers to the well-documented tendency of people to be unduly influenced by salient information. The operation of availability bias means that even if managers received representative information about jury awards in employment cases, they would tend to remember those cases that are particularly salient (e.g., cases in which employers are required to pay large awards), and as a result, have a biased assessment of the threat of employment litigation. Extensive research indicates, however, that instead of representative information about jury awards, the media typically provides managers information that is skewed heavily in the direction of inflating the risk of litigation. For example, a content analysis of human resource journals found that plaintiffs were portrayed as winning in 78% of the wrongful discharge cases involving implied contract claims. In sharp contrast, a systematic assessment of actual court cases during the same period revealed that plaintiffs prevailed in only 15% of the implied contract cases in two states judged to be "very receptive" to the implied contract exception to employment at-will (California and Michigan)<sup>8</sup>. Other research indicates that lawyers share an inflated perception of litigation risk<sup>9</sup>, and it has been frequently observed that there are incentives for lawyers to inflate the risk of litigation when communicating with clients (discussed further, below). The skewed picture of liability provided by the media and some lawyers combines with the operation of availability bias to generate overestimates of the frequency and magnitude of damages in employment cases. These overestimates, in turn, promote legal-centric decision making.

Even when relevant information is salient and attended to by decision makers,

systematic biases act to distort the influence that different types of information have on the ultimate decision. Most notably, a substantial body of research indicates most decision makers demonstrate a loss aversion bias, or tendency to weigh losses more heavily than gains. For example, if Alternative A is described as involving a sure loss of \$750, and Alternative B as involving a 75% chance of losing \$1000 and a 25% chance of losing nothing, most people will avoid the sure loss and take a chance on not losing anything (even though the absolute value of the two alternatives is equal). Not coincidentally, legal-centric decisions are driven by the desire to avoid what are perceived as almost certain litigation related losses, and the potential non-legal benefits associated with alternative courses of action (e.g., improved employer-employee relations) are given little, if any, weight.

Finally, cognitive biases are also likely to contribute to inaccurate assessments of past decisions that reinforce and perpetuate legal-centric decision making. The tendency of decision makers to seek out and attend to information that supports and reaffirms their earlier judgments while discounting evidence that runs counter to it is referred to as confirmation bias. This bias suggests that if not challenged or forced to critically assess the effectiveness of past decisions, decisions makers will be slow to recognize the negative consequences of legal-centric decision making when they occur. Further, the strong tendency of people to demonstrate self-serving biases, attributing positive outcomes to their own efforts and negative outcomes to external causes<sup>10</sup>, suggests that in those instances when decision makers do associate an organizationally dysfunctional outcome with a legal-centric decision, there will be a tendency to attribute the negative outcome to external causes (e.g., the inevitable result of a highly irrational legal system), and not to the quality of the decision itself (an internal cause).

Other departures from rational decision making that may contribute to legal-centric decisions occur at a more conscious level. For example, research has also demonstrated that when faced with complex decisions, rather than engaging in a careful and systematic assessment of available options and selecting the one that is expected to maximize their net

benefits, decision makers often engage in satisficing, or settling for a decision alternative that meets some minimum level of acceptability<sup>11</sup>. Satisficing is most likely to contribute to legal-centric decisions making when, as often appears to be the case, legal considerations provide the standard for what constitutes a minimum level of acceptability (e.g., “the alternative meets all legal requirements”, or “the alternative has the approval of legal counsel”).

In summary, the occurrence of legal-centric decision making is explained, in part, by a number of cognitive biases and satisficing that depart from rational decision making. These departures reflect the mind’s attempt to deal with the cognitive demands presented by the task at hand, and while they occur under a wide range of circumstances, there are steps that can be taken to minimize their impact on managerial decision making. The strategic approach that we will be discussing incorporates a number of those steps.

Decision-maker self-interest. Cognitive biases and satisficing may contribute to legal-centric decision making despite the good faith intention of the decision maker to pursue the best interest of the organization. However, legal-centric decisions may also result from a conscious choice by the decision maker to pursue what is perceived to be in his or her personal best interest (rather than the employer’s best interest). Specifically, there is evidence that rather than voice their concerns regarding non-legal considerations, or otherwise critically evaluate the employment decision at hand, some managers and HR professionals consciously choose to simply defer to a lawyer’s recommendation in order to shift risk to the lawyer and avoid responsibility should a bad outcome result<sup>12</sup>. As one HR professional noted when explaining why he did not question his company’s insistence that employees sign employment at-will agreements despite concerns he had about the effect on employee relations: “I may not think that it is the best way to go, but as long as I do what our lawyer tells me to do, it’s his neck on the line, not mine.”

Biased perspective and dominant role of lawyers. With rare exceptions, lawyers promote legal-centric decision making regarding employment decisions through the biased content of



their input. Instead of reflecting the kind of systematic assessment of relevant considerations and potential alternative courses of action that rational models of decision making imply, lawyers' input typically focuses on legal considerations and legalistic solutions. Particular emphasis is placed on the threat of litigation and generating favorable evidence that will improve their chances of success if claims arise. Finally, in focusing on the threat of litigation, there is a strong tendency among lawyers to overstate the risk of salient potential claims<sup>13</sup>.

This biased perspective has been attributed to two factors, the nature of legal training and the influence of lawyer's self-interest. A frequent criticism of the education provided by law schools is that it trains lawyers to think that there is a legal solution to every problem, and does not give lawyers the ability to successfully deal with the human issues that inevitably arise in the practice of law. The potential importance of non-legal considerations, described by one legal commentator as the "lost stepchild" of the American legal profession<sup>14</sup>, is either not recognized, or marginalized to the point of practical irrelevance. The dominant model of law school education also contributes to legal-centric decisions because of its adversarial, conflict oriented approach that defines successful lawyering as fighting to win. It has been observed that even in informal settings, such as in-house advising, "the lawyer reasons back to the ultimate fight – in the courtroom, at the bargaining table, or in the administrative hearing – to develop strategies and legal responses that would best position the client to win should a crisis arise."<sup>15</sup>

Unfortunately, strategies that may produce "wins" in the "ultimate fight" may not help prevent the fights from occurring in the first place, nor are they necessarily organizationally sensible when criteria other than winning disputes are deemed relevant.

These limitations of legal training are not "news" in any sense; others, including legal scholars, have identified these limitations and called for reforms, and some law schools have begun to respond. However, most lawyers have received training that provides the limited perspective we have described. Moreover, as suggested earlier, even among lawyers whose training has given them greater sensitivity to non-legal concerns, lawyers' strong personal stake

in the advice that they give may influence their advice in ways that promote legal-centric decisions. First, lawyer's sensitivity to the potential personal reputational costs associated with the advice that they give creates an incentive for them to overstate the legal risks associated with the decision at hand. It has been observed that in giving advice for which they may be held accountable, lawyers have far more to lose by "giving the go ahead" to a course of action that is later subject to legal challenge than they have to gain from advice that is not challenged. Because most clients lack the expertise to second-guess lawyers' judgments regarding legal matters, there is frequently no reputational penalty associated with advice that is over cautious<sup>16</sup>. Moreover, because lawyers are typically not held accountable for the impact of their advice on non-legal considerations (e.g., employee relations), there is generally no reputational penalty associated with advice that ignores non-legal considerations.

Second, although lawyers have a personal stake in giving advice that will not be subsequently perceived as having led to legal liability for their client, there are far fewer incentives for them to attempt to proactively identify and take into account systemic conditions in the organization that may be contributing to employment litigation levels. On the contrary, so long as the threatened litigation is not directly attributable to the lawyer, most lawyers see at least some personal benefit resulting from their client's (or employers) increased involvement in litigation. This observation is supported by the results of a study indicating that over 85% of the outside legal counsel that were surveyed believed that a substantial increase in the volume of litigation that their clients were involved in would be personally beneficial to the lawyer's compensation, career advancement, and prestige<sup>17</sup>. Inside legal counsel viewed an increase in their employer's involvement in litigation as providing them similar personal benefits, but not as consistently: 72% viewed increased litigation as increasing their prestige within the organization employing them, 42% believed it would increase their career opportunities, and 37% viewed increased litigation as resulting in greater personal compensation. In sum, whether due to the limitations of most law school training, or lawyer pursuit of their self interest at the expense of

broader organizational concerns, the typically biased input of lawyers is a primary contributor to legal-centric decision making.

All of the above mentioned factors contribute to an environment that encourages legal-centric decision-making far in excess of what may be in the best interest of the firm. The next section will describe a model that should limit the influence of legal considerations to an appropriate level when compared to other organizationally relevant criteria.

A Strategic Approach to Employment Decisions That Have Potential Legal Implications  
Strategic Versus Legal-Centric Approaches

As we have suggested, with rare exceptions, a truly well informed approach to employment decisions having potential legal implications will not be obtained by simply consulting legal counsel and deferring to their recommendation. Rather, it requires a broader, more strategic approach. In this context, a “strategic approach” describes a process that considers the alternatives for addressing concerns raised by the employment issues and systematically evaluates them taking into account the organization’s mission and values, the human resource implications of the alternatives, the full range of legal considerations (immediate and long-term; not focusing on producing evidence to defeat salient claims), and the impact of the various alternatives on organizational competitiveness. The fundamental differences between the strategic approach advocated in this article and the legal-centric approach that appears to dominate employment decisions in many organizations are summarized in Table 2. The keys to implementing a strategic approach are identified and discussed in the sections that immediately follow.

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Insert Table 2 about here.

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Clear Goals

The value of clearly stated goals in the decision making process is well recognized. Goals provide criteria for assessing what constitutes a “good decision”, focusing decision maker attention to help ensure that relevant information is not overlooked, and that irrelevant information does not influence the final decision. By providing criteria and focusing attention, explicit goals reduce uncertainty in the decision process, which in turn, reduces the likelihood that decision makers will invoke heuristics that result in biases (e.g., availability bias) that unduly influence their decision. The implicit goal of legal-centric decision making is to maximize the organization’s ability to defend against salient litigation threats. In most situations, however, employers are likely to have a number of other goals that may be impacted by the employment decision. Table 3 provides examples of the type of goals that might be relevant to employers adopting a strategic approach to employment decision making.

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Insert Table 3 about here.

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Clear Roles

Confusion or uncertainty about what is expected of participants may have a number of negative effects on the decision making process. HR professionals who are uncertain about their role may become passive in the presence of legal counsel, not offering their perspective and insights because it is not clear that it is appropriate for them to do so, and they do not want to look foolish (especially in front of senior management). Conversely, many lawyers assume that they are expected to be “the expert” and provide “the answer”, and so in an authoritative manner that tends to inhibit input from other participants, they offer a recommended course of action. Unclear roles may also undermine accountability in the decision making process by providing individual participants the sometimes legitimate excuse that “no one told me that was

my responsibility” when a bad outcome results because an important factor was overlooked, or an important task not performed in the decision process.

The clear specification of the role that each participant in the decision process is to assume will help produce better informed, less biased decisions by reducing uncertainty associated with role ambiguity and increasing the participant’s respective accountability. Further, by creating roles which include an expectation that all participants will critically evaluate the input provided by others, the specification of roles may reduce groupthink and promote critical thinking and idea generation. The most appropriate specification of roles may vary depending on number of factors (e.g., the specific configuration of participants in the process, the nature of the decision task). Table 4 provides a sample specification of roles based on the assumption that a senior level manager, an HR professional, and legal counsel are all participants in an important employment related policy or practice decision. The sample role specification seeks to manage the cognitive complexity associated with employment decisions that have legal implications by decomposing the decision tasks that need to be performed, and assigning primary responsibility for several key tasks to the participant who is likely to have the greatest relevant expertise.

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Insert Table 4 about here.

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A Clear Understanding of the Legal Concern(s) Involved and Management of Legal Input

At a general level, employment decisions involve two related, but distinct legal concerns: 1) To what extent does the law mandate that a specific policy or practice be followed, a specific behavior demonstrated, or specific choice made?; and 2) To what extent is there a threat of litigation associated with the contemplated course(s) of action? The first concern is about legal

requirements, the second about litigation risk. The failure to make a distinction between these two legal concerns may contribute to a decision that is unnecessarily dictated by legal concerns. Therefore, when legal concerns arise in the employment decision making process, it is important that the nature of the legal concern be explicitly considered and, to the extent possible, clearly specified. In most instances, this requires that both of the questions identified immediately above be addressed.

Assessing legal requirements. Within a given legal jurisdiction, the extent to which the law requires (or prohibits) a specific course of action will vary depending on the specific employment decision. At one extreme are decisions regarding employment issues that are governed by clear and specific legal requirements. That is, a course of action that must be followed is prescribed by law, and in essence, there is really no decision to be made. We will refer to this category of decisions as decisions dictated by legal requirements. When it is determined that the employment decision falls in this category, it is appropriate for managers to defer to lawyer's judgment as to the specific compliance that is required. Decisions that fall in dictated by legal requirements category tend to be relatively operational in nature and narrow in scope (e.g., Should the non-exempt employees of a financially struggling company be required to work occasional week-ends for no additional compensation? At what point in the selection process should job candidates be given medical examinations?)

At the other extreme are decisions that clearly do not involve legal requirements. One such decision, involving how employers should respond to eroding employment at will doctrine, will be discussed at length below. Between these two "extremes" is a wide range of employment decisions for which the law provides some minimum constraints, but within those parameters, allows employers substantial discretion to consider non-legal factors. Many, if not most of the frequently reoccurring employment decisions fall in this category (hiring, promotion, termination, etc.). For example, fair employment laws in the United States prohibit discrimination based on a limited set of protected characteristics (e.g. race, age, religion, etc.), but within those

constraints, private sector employers have considerable discretion in choosing the criteria and means for selecting employees. Admittedly, the discretion is not as unlimited as some employers would like, but so long as protected characteristics are not involved, either directly or as a result of selection practices that have a substantial negative impact on a protected group, employers do not have to follow sound HR practices, and may even act arbitrarily (e.g., hiring only applicants who wear brown shoes to the job interview).

Of course, there will be situations where the applicable legal requirements are ambiguous or uncertain. This is, for example, often the case when newly passed legislation first goes into effect. Nonetheless, the extent to which legal concerns involve legal requirements should be routinely and explicitly considered because: 1) there are also situations where there are relatively clear legal requirements (e.g., wage and hour laws, occupational safety regulations), and decisions that clearly do not involve requirements; 2) even in situations when uncertainty regarding legal requirements exist, it can often be significantly reduced when the nature of the legal concerns involved are given explicit consideration, and 3) there is value in knowing if you are dealing with legal requirements that cannot be specified with a reasonable degree of certainty. For example, while clear and specific legal requirements should be considered non-compensatory factors that must be met, if the law's requirements are so ambiguous that they cannot be determined with even a reasonable degree of certainty, then concern about meeting legal requirements might be given less weight in the decision, perhaps treated as a compensatory factor that is balanced against other considerations.

Before discussing the second step in developing a clear understanding of the legal concerns involved in an employment decision, a few words should be said about how and when the issue of legal requirements should be addressed. Some managers and HR professionals are quite knowledgeable about basic employment law requirements. However, there will be many occasions where a lawyer's superior legal expertise is called for. When lawyers are consulted, they cannot be counted on to provide sufficiently specific guidance regarding the

nature of legal concerns involved without prompting. Therefore, we suggest that a manager participating in the decision making process be assigned the responsibility of explicitly raising the question of legal requirements with the lawyer (see Table 4).

The way in which the issue is most effectively prompted depends, in part, at the point in the process that the lawyer's input is sought. In the interest of efficiency, a lawyer's input may be sought early in the process so that if there are applicable legal requirements, they may be used as criteria for screening all potential alternatives before significant time is spent considering an alternative that ultimately may not pass legal muster. The risk of seeking legal input early in the process is that the lawyer's influence may unduly constrain the generation of decision alternatives, prematurely foreclosing the consideration of new or more innovative options. Therefore, where the goal of efficiency in the process is clearly subordinate to the goal of effectiveness, consideration should be given to holding off on seeking legal input until after one or more favored alternatives have been identified based on other relevant, non-legal criteria. In other words, assume that there are no relevant legal concerns and identify the most organizationally sensible decision that could be made. When this approach is followed, there should be a reframing of the manner in which the lawyer's input is prompted. Rather than asking "What are the applicable legal requirements, if any?", the lawyer should be advised of the favored course of action, and why it is the favored course, and then asked "Does the law strictly prohibit us from implementing our preferred decision?" This framing of the question requires the lawyer to address the legal requirements versus litigation threat distinction, resulting in more precise input regarding the nature of the legal concerns that may be involved.

Assessing the net effect on total litigation risk. The relatively open access that individuals have to the courts and governmental agencies in the United States and many other industrialized countries means that virtually all employment decisions, including those which are legally permissible "on their face", involve some threat of litigation. Differences in how the threat of litigation is dealt with (reacted to uncritically versus systematically assessed), and the weight



that it is given, may dramatically influence the course of action that is determined to be the “best” decision choice. Managers who engage in legal-centric decision making appear to be reacting to salient information about a particular litigation threat and the purported dire consequences that will befall employers who do not take action to address it. For example, in 1991 a highly publicized California Appellate Court case, Soroka v. Dayton Hudson Corporation<sup>18</sup>, held that an employer’s use of a personality test to select new employees involved an invasion of privacy, a civil wrong for which the plaintiff who took the test was entitled to recover monetary damages. The court’s ruling was based on a finding that several questions on the personality test were unreasonably intrusive and offensive. As a result of the heightened sense of litigation risk generated by the Soroka case and the articles that followed it warning against the “legal pitfalls” associated with use of personality testing<sup>19</sup>, some employers decided to discontinue the use of personality testing in their selection process.

Instead of merely reacting to immediate and highly salient litigation threats, the strategic approach involves an effort to systematically assess the full range of litigation threats that may be impacted, either negatively (increased) or positively (reduced) by the decision, to determine the net effect of contemplated course(s) of action on total litigation risk. That is, a conscious effort is made to identify and take into account more distal, less obvious threats, and recognition is given to the fact that a course of action that is taken to reduce one type of litigation threat may increase the risk of other types of litigation (examples provided earlier, at pages 5-6).

In addition, the magnitude of the risk associated with identified litigation threats is evaluated with a more critical eye than is typically the case in legal-centric decision making. Articles appearing in newspapers and employer oriented publications, television news coverage, and lawyers recommending defensive tactics, typically focus attention on extreme or “headline cases” involving employee litigation. This readily available, highly biased information is put in context by asking basic questions and, in some instances, obtaining relevant information. For example, the largest verdicts from the most plaintiff friendly jurisdictions (e.g.,

Los Angeles, Miami) can be found in the headlines, but what is the likely or average jury awards for similar cases in the jurisdiction(s) in which your organization operates? The vast majority of employees never initiate litigation against their employer; what is the likelihood that an employee will ever file the type of claim in question? If a claim is filed, what is the probability that the plaintiff-employee will win? In some situations, estimating the per employee cost of a litigation threat is a particularly useful approach for putting the threat in a broader, more informative context.<sup>20</sup> For example, at a time when many human resource publications were reporting that the average jury verdict in wrongful discharge cases was \$424,000, a more scientifically conducted Rand Institute study concluded that when the vast majority of employees who never initiate litigation are included in the analysis, the legal costs associated with the at-will doctrine were only \$10 per employee, per year. This finding prompted the study's authors to observe: "Personnel managers may be reacting to perceived rather than actual legal risks."<sup>21</sup>

The critical thinking and foresight required by the total litigation threat analysis described above is likely to benefit from the participation of individuals with multiple perspectives regarding the law, human behavior, and the internal dynamics of the organization (i.e., it is not the exclusive domain of lawyers). Accordingly, the sample specification of roles provided in Table 4 indicates that a common responsibility of all participants in the decision process is to "Participate in brainstorming to help identify ways in which a course of action that is expected to reduce a focal litigation threat may increase the risk of less salient litigation threats."

We return to the Soroka case and its aftermath to briefly illustrate how a more systematic assessment of net litigation risk would have lead to a different decision than that yielded by the legal-centric approach reflected in the decisions of employers who discontinued personality testing. As noted earlier, employers who discontinued the use of personality testing effectively eliminated the most salient legal threat, invasion of privacy claims. What, however, was the likely net effect on the total litigation risk? The answer to this question is informed by

the recognition of two important qualities of well constructed personality tests are appropriately matched to the job in question. First, when added to other selection tools (e.g., job interviews, mental ability tests), personality tests tend to make a unique contribution to enhancing the employer's ability to predict who will be successful employees (i.e., they demonstrate incremental validity). Second, unlike some valid selection devices (e.g., cognitive ability tests), personality tests appear to be race neutral. For this reason, it has been recommended that employers concerned about the adverse impact of their selection process on minorities should consider adding the use of a validated personality test<sup>22</sup>.

Consideration of these two characteristics of personality tests leads to the assessment that while discontinuing the use of personality testing effectively eliminated the threat of an invasion of privacy claim, it may have produced a net increase in total litigation risk. Because personality tests tend to add incremental validity to the selection process, discontinuing the use of a valid personality test would reduce the employer's ability to accurately predict which applicants will be successful employees. This decreased ability, in turn, can be expected to increase the number of involuntary terminations an employer must make, a strong predictor of the amount of employee discharge litigation an employer will become involved in. In addition, all other things equal, the removal of the information about applicants that is provided by a race neutral personality test would increase the likelihood that the selection process would have a differential impact on minorities, thereby increasing the risk of claims of adverse impact discrimination. The more strategic response to the Soroka decision, and one that is probably obvious when decision makers' attention is not focused on headlines reporting a large verdict and a barrage of articles warning against the legal dangers associated with personality testing, would not be to abandon personality testing. Rather it would be to recognize the very specific, narrow nature of the invasion of privacy threat and take care to use one of the many valid personality test that do not contain questions that are objectionable.

The foregoing example illustrates several important points regarding the assessment of

litigation risk that warrant emphasis. First, anytime it is suggested that an otherwise valid human resource practice should be abandoned solely because of the threat of potential litigation, a “red flag” should go up, and special attention given to assessing less obvious litigation threats that may be increased by the decision. For example, an employer may contemplate discontinuing the use of cognitive ability testing in order to reduce the very real threat that members of minority groups may file a disparate impact discrimination claim. However, the assessment of net litigation risk requires that the decision maker also take into account the likelihood that discontinuing the use of cognitive test will result in more hiring “misses”, increasing the number of involuntary employee terminations the employer has to make (again, a strong predictor of employee discharge litigation). Also, before discontinuing diversity training because of the concern that statements made by managers or other employees attending the training may be somehow offered at a latter date as evidence of a discriminatory work environment, one must also account for the risk that not providing the diversity training will result in more claims by employees or customers “down the road.”

Second, the example also illustrates the value of including multiple perspectives in the assessment of net litigation risk. Knowledge of the characteristics of personality testing was necessary to recognize the increased litigation threat associated with discontinuing their use, and, we would suggest, the average HR professional would be more likely to be able to contribute that knowledge than the average lawyer. Similarly, there will be occasions where participating managers or lawyers will have unique knowledge or insights that contribute to a better informed assessment of litigation risk.

Third, and perhaps most important, the Soroka example highlights the fact that when decision makers make the effort to carefully think through the potential litigation consequences of an employment decision, rather than merely reacting to litigation threats made salient by publicity or legal counsel, it is often the case that there are countervailing effects on total litigation risk associated with pursuing, or not pursuing, a contemplated course of action. These

countervailing threats combined with the general difficulty of precisely assessing litigation risk, mean that in many situations, the threat of litigation is essentially a constant across alternative courses of action (“damned if you, damned if you don’t). In those situations, the determination of what is the best choice must be based on other, non-legal criteria.

### Systematic Assessment of Relevant Non-legal Factors

For the vast majority of employment decisions that are not strictly mandated by law, the strategic approach requires that relevant non-legal considerations be identified and taken into account. Given their expertise, HR professionals should assume primary responsibility for seeing that relevant non-legal considerations are brought to the attention of decision makers, and managers should hold HR professionals accountable for discharging that responsibility. The goals specified at the onset of the decision making process (e.g., Table 3) provide a useful starting point for identifying important non-legal considerations.

Further, whether or not specifically embodied in an organization goal, a primary concern should be the extent to which the final decision will be perceived by employees as consistent with the organization’s stated mission, espoused values, and existing policies and practices. Consistency in the substance, symbolism, and application of organizational policies and practices is a critical issue<sup>23</sup>. Consistent policies and practices provide employees a clearer sense of what they can expect and what is expected of them. Inconsistent policies and practices may create mistrust, and perceived inconsistencies in the application of policies within an organization may contribute to invidious social comparisons and feelings of distributive injustice. The potential sources of inconsistency are too numerous to list. However, the illustration of the strategic approach provided in the following section includes examples of the kinds of consistency issues that may arise.

#### Illustration of the Strategic Approach: Responding to the Eroding Employment At-Will Doctrine

This section illustrates the recommended strategic approach to employment decision making by applying it to an issue that continues to have an important and controversial impact

on private-sector employment relationships in the United States: how to respond to the eroding employment at-will doctrine. “Employment at-will” is a common law doctrine which provides that in the absence of a specified employment contract, private sector employers can legally dismiss an employee for a good reason, a bad reason, or no reason at all, as long as the dismissal does not violate the provisions of some specific statute (e.g., Civil Rights Act of 1991, National Labor Relations Act).

In recent years, the protection provided employers by the employment at-will doctrine has eroded as a result of judicially recognized exceptions to the doctrine based on theories of implied contract, public policy (e.g., retaliation against an employee for testifying truthfully in court), an implied covenant of good faith and fair dealing, and tort (e.g. intentional infliction of emotional distress). These exceptions have placed additional limits on the circumstances under which private sector employers can lawfully discharge their employees without cause. The number of exceptions and court rulings regarding the circumstances to which the exceptions apply continue to evolve, leaving the law in this area in a state of uncertainty.

The overwhelming employer response to the uncertainty resulting from the eroding employment at-will doctrine is one that exemplifies legal-centric decision making. Focusing on the perceived costs associated with a salient litigation threat, implied contract claims, and acting directly on advice of legal counsel in most instances, private sector employers have taken affirmative steps to protect their right to fire employees without good cause. Steps include sanitizing all employer communications to avoid any suggestion that a continuing employment relationship is contemplated, placing disclaimer statements reasserting the right to fire "with or without cause" in job applications, recruitment literature, and employee handbooks, and requiring employees to sign written employment at-will agreements. Articles treating the legal-centric approach to responding to the eroding at-will doctrine as a “best practice” are commonplace. They state, without qualification, that employee handbooks “should” or “must” contain an at-will disclaimer, or employers “should” or “must” have employees sign at-will

agreement, or that the at-will status of employees should be protected “at all costs”<sup>24</sup>.

Others, although a definite minority, express disagreement with the legalistic response, raising questions regarding its effect on employee motivation, loyalty, and retention. For example, in his influential book The Human Equation, Pfeffer argues that due primarily to the reciprocal nature of commitment, providing employees job security that includes freedom from arbitrary discharge is one of seven key employer best practices linked to companies’ financial success<sup>25</sup>. Because there are competing “best practice” claims regarding how to respond to the eroding employment at-will doctrine, organizations should be asking themselves the question: Which best practice is the best practice for our organization? A well informed answer to this question, we suggest, requires the following kind of strategic assessment.

### Roles and Goals

We begin our illustration with the assumption that all of the participants in the decision process (managers, HR professionals, lawyers) have clear understandings of their roles, and that their respective roles approximate those set forth in Table 4. It is further assumed that at the onset of the decision process, the goals listed in Table 3 were explicitly identified as relevant to the organization’s decision regarding how it should respond to the eroding employment at-will doctrine. These goals were selected for the illustration because, although not universal, they are goals that are increasingly shared among global/international employers. The identified goals provide the criteria for evaluating and selecting among potential alternative responses. In contrast to this set of goals, the legal-centric response to the at-will employment issue is driven by a single implicit goal: reduce the threat of implied contract claims.

### Identifying Alternatives

There are a variety of potential alternatives for responding to the concerns raised by the eroding employment at-will doctrine. Due to necessary constraints on the length of the present discussion, this illustration focuses on the two most frequently mentioned: taking aggressive practices aimed at preserving the at-will status of employees versus adopting a policy that

employees will only be discharged for good cause. Depending on the organization, variations of these alternatives, or alternatives that we do not discussed, may be more effective in addressing an organization's goals (i.e., there is a need for employers to identify and consider other potential responses to the at-will concerns).

Clarifying the Nature of the Legal Considerations Involved

Not a matter involving legal requirements. Although many articles that managers read, and some lawyers that they interact with, may create the general impression that the law requires an aggressive response to the eroding at-will doctrine, if managers directly ask their legal counsel the question "Does the law require a specific course of action?", they will learn that the at-will policy decision is not a matter of legal requirements. Employers are free to decide whether they should take affirmative steps to try to preserve the at-will status of employees, or provide employees greater security from discharge, or do nothing at all. Fundamentally, it is a management decision (about the kind of employer-employee relationship an organization seeks to promote) that has potential legal implications. Because the at-will policy decision does not involve legal requirements, but merely has potential legal implications, "the door is left open" for the more strategic consideration of both litigation risk and non-legal factors.

Assessment of the net effect on total litigation risk. As previously indicated, the salient litigation threat that is the driving force behind the legal-centric response to the eroding employment at-will doctrine is the threat of an implied contract claim (i.e., the threat that an employee will claim that through its words or actions, the employer gave the otherwise at-will employee the right to be discharged only for cause). Without a doubt, aggressive at-will practices can significantly reduce the threat of such claims. This is where the inquiry ends for most lawyers, and for managers following a legal-centric approach. However, the strategic approach involves a broader assessment of the net effect of the decision on the total litigation risk associated with the decision. Further, the total litigation risk assessment must be then considered in light of, and balanced against, the costs and benefits of non-legal considerations.



Table 5 was prepared to facilitate the systematic assessment of relevant factors; it is the kind of table employers should consider constructing when contemplating a significant employment policy or practice decision. The table identifies 13 legal and non-legal considerations on which alternatives to responding to the eroding employment at-will doctrine might be compared. For each consideration, an “X” is marked in the column of the alternative (“at-will” or “good cause”) judged to provide an advantage in addressing that consideration. In those instances where there are legitimate competing claims, and neither policy can be judged to provide an advantage with a reasonable degree of certainty, an “X” is marked in the “Mixed Views” column.

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Insert Table 5 about here.

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The top half of Table 5 identifies six legal considerations on which alternatives to responding to the eroding employment at-will doctrine might be compared. In contrast to legal-centric approaches, a clear distinction is made between an alternative’s effect on the extent to which employees initiate litigation (i.e., file claims with the court or governmental agencies) versus its effect on an employer’s ability to provide a legal defense to claims once they have been initiated. This distinction is important given evidence that the average cost of defending a wrongful discharge claim may be greater than the average award in such cases, and the possibility that some steps taken to reduce the likelihood that claims are initiated may make it more difficult to defend claims once they arise (and vice versa). Also, in addition to considering the likely effect of alternative responses on the focal legal concern (implied contract claims), explicit consideration is also given to the alternative’s effect on legal claims which are relevant but less salient in the at-will decision context (e.g., illegal employment discrimination claims).

As the summary in Table 5 indicates, an assessment of the effect of the alternatives on a range of legal considerations suggests that while aggressive at-will practices do provide

increased protection against implied contract claims, there is no basis for concluding that they are likely to result in a net reduction in total litigation related costs. This finding is explained by the interaction of three factors: a normative belief that employers should have a good reason for discharging an employee, the very limited legal protection provided by at-will policies, and the availability of multiple theories or claims that may be pursued by employees who feel that they have been unfairly discharged.

A growing body of research provides evidence that, regardless of their employer's formal policy, most employees believe that their employer is obligated to have good reasons to discharge them. This belief has been described as a robust "good cause norm" that is reflected in employees' psychological contract (an employee's subjective perception of obligations in their employment relationship)<sup>26</sup>. The failure of an employer to be able to offer a good reason for an employee discharge may not violate the formal at-will employment agreement, but it would still violate the employee's psychological contract, resulting in the kind of anger and outrage that often leads to litigation<sup>27</sup>. Because even the most aggressive employment at-will policies and practices only provide legal protection against one kind of claim, implied contracts, employees who feel violated may still pursue a variety of other potential claims arising out of a discharge (e.g., illegal employment discrimination, tort, violation of public policy). Moreover, evidence supporting the existence of a good cause norm indicates that it will be widely shared by judges and juries. This means that if an employer is not able to provide a good reason for an employee's discharge, judges and juries will be inclined to recognize one of the other types of legal claims that are likely to be available to the plaintiff-employee in order to remedy the employer's breach of the good cause norm. The result? As a practical matter, even at-will employers are likely to be facing a "defacto" good cause standard.

Not only is there a lack of dispositive evidence that aggressive at-will practices result in lower net litigation related costs, there are reasons for employers to be concerned that such practices may actually lead to greater total litigation related costs. This may occur if the negative

inferences employees make about employers based on their use of at-will agreements lead to mistrust or expectations of unfair treatment that become self-fulfilling. That is, by raising employee concerns that the employer may treat employees unfairly, employees may be more likely to view a discharge as arbitrary or unfair when it occurs. Of even greater concern should be legal commentators observation that the effective exclusion of implied contract claims through aggressive at-will practices causes employees who feel that they were unfairly discharged to frame their claims as involving more costly illegal employment discrimination<sup>28</sup>. Finally, in some jurisdictions, an employer's insistence on signed formal at-will agreements may undermine the effectiveness other legal safeguards. For example, a court in Michigan held that a discharged employee was not obligated to arbitrate her claim because the purported arbitration clause also contained an at-will disclaimer, which the court viewed as indicating the employer did not intend to be bound by the handbook<sup>29</sup>.

Although there are reasons for employers to be concerned that aggressive at-will practices may actually lead to greater litigation related costs, we would note that, as is often the case when the legal implications of different decision choices are carefully assessed, neither the aggressive at-will alternative nor the good cause alternative provide a clear, well documented advantage in reducing total litigation related costs. This conclusion, once again, highlights the importance of giving careful consideration to the likely impact of the alternative policies on relevant non-legal considerations in deciding which alternative should be adopted.

#### Systematic Assessment of Non-Legal Considerations

Even if it were assumed, for the sake of argument, that aggressive at-will practices provide some net increase in protection against legal claims, because the matter is not one involving clear and specific legal requirements, a strategic approach requires that the evaluation of the alternative responses balance that legal benefit against the likely non-legal cost and benefits. The bottom half of Table 5 provides a summary of how the two policy alternatives compare on relevant non-legal factors.

Consistency in the eyes of employees. Given the importance of consistency in employer policies and practices, discussed above, any potential response to the eroding employment at-will doctrine should be evaluated in terms of its consistency with the organization's mission, espoused values, and overall approach to its workforce. The following examples illustrate the kinds of consistency issues that may arise. Does the organization's mission or value statement(s) emphasize the importance of employees, or respect for employees? If so, research suggests that a policy that reserves the right to discharge employees "without notice, and with or without good cause" may create an inconsistency in the eyes of many employees<sup>30</sup>. If emphasis is placed on egalitarianism, a response that reasserts the at-will status of rank and file employees while granting top executives individual contracts with protection from arbitrary discharge may result in a perceived inconsistency - especially given that the most costly wrongful discharge claims involve upper level employees. Finally, given that most industrialized countries mandate some form of protection against arbitrary discharge<sup>31</sup>, organizations with global workforces need to be concerned about the consistency of their response across international boundaries. Should an employer seek to aggressively maintain a right to discharge employees working in the United States without good cause while the company applies a different, higher standard in dealing with its employees in other countries?

Impact on recruitment. The attraction of high quality employees, or "war for talent", continues to be a major concern for most employers. Researchers have found that explicit at-will policies have a negative impact on job applicants' evaluation of potential employers, and policies granting employees formal protection from arbitrary discharge (the right to due process, or requiring the employer to have good cause to discharge) have a significant positive effect on their evaluations of potential employers<sup>32</sup>. The research suggests that the negative effect of at-will policies is due to a number of negative inferences job seekers make based on employer's adoption of at-will policies (e.g., the employer is not committed to its employees, treats them poorly, etc.). In sum, there is reason to expect that how an employer chooses to respond to the

eroding at-will problem may affect its ability to attract employees.

Employee retention: Voluntary turnover and involuntary discharge. Consideration should also be given to two concerns relating to employee retention: voluntary turnover and the making of valid discharge decisions. As others have observed, the norm of reciprocity suggests that a likely consequence of telling employees that the organization is not willing to obligate itself to have good reasons to discharge them is a relative lack of long-term attachment and commitment of the part of its employees, which in turn, leads to greater voluntary turnover<sup>33</sup>. Consistent with this assessment, a recent study of employee psychological contracts suggests that compared to non-union employees working for an organizations that agreed to terminate their employment only for good reasons, non-union employees working for at-will employers felt less obligated to stay with their employer. **(CITE?)**

The alternatives also vary in their influence on the likelihood that an employer will err in deciding to discharge, or not discharge, employees. It is useful to distinguish between two types of discharge errors in this analysis. Type I employee discharge error occurs when an employer decides to discharge an employee when perfect information would lead to a decision to retain the employee. Type II employee discharge error occurs when an employer decides not to discharge an employee when perfect information would lead to a decision to terminate the employee. The relative importance of avoiding these two types of discharge errors may vary across organizations. For example, all other things equal, the importance of avoiding Type I will increase to the extent that the organization invests heavily in developing its employees, and to the extent that the employees in question are not easily replaced. The importance of avoiding Type II error will be greatest where there are significant irrevocable costs associated with failed employee performance (e.g., injury to customers or coworkers) and replacement employees of equal or better quality are available.

Turning to the likely effect of the policies, goal setting theory suggests that a defined good cause standard that is committed to publicly will increase the likelihood that discharges are

in fact for good reasons, thereby reducing the risk of Type 1 discharge error (discharging an employee who should be retained). The relative lack of accountability associated with employment at-will, on the other hand, may tend to promote Type 1 errors. The effect of the alternatives on Type II discharge error is less clear. It is frequently argued that concerns about being held to a good cause standard may lead some managers to delay discharging an employee who should be discharged, contributing to Type II error (retaining an employee who should be discharged). However, there is also evidence that some managers avoid discharge decisions simply because they are uncertain, if not confused, about what constitutes an acceptable reason for the discharge of an employee. Under those circumstances, adopting a good cause policy with a clearly defined good cause standard may reduce Type II discharge error by reducing the uncertainty in discharge standards that causes managers to avoid the discharge decision.

Impact on employee productivity. The impact of the policy alternatives on employee productivity is perhaps the area of greatest speculation and competing views. On one hand, it is argued that an at-will policy facilitates the removal of less productive workers and the greater threat of discharge motivates employees to work harder. Others reject “management by threat” and argue that protection from arbitrary discharge is a “best practice” that promotes behaviors related to greater productivity.<sup>34</sup> A strategic approach would recognize that there are competing claims, but no hard evidence that is generalizable to all employers. Considered in light of the various factors that may influence employee productivity (e.g., work design, technology, investment in human capital), the effect of either policy is likely to be relatively small. Arguments regarding the importance of reciprocity in developing employee commitment suggest that a good cause policy is most likely to have a positive impact on employee productivity in participatory, high involvement settings where it is important to have committed employees that go above and beyond formal job descriptions, and exercise available discretion in ways that are aligned with the employer’s best interest.

Tendency to promote diversity goals. Whether due to governmental mandate, necessities arising from changing work force demographics, or greater appreciation of its potential value to organizational competitiveness, a growing number of organizations recognize workforce diversity as a goal. For those organizations, the likely effect of the two alternative responses on their diversity goals should be evaluated. It has been argued that at-will policies may undermine diversity efforts by creating an incentive for managers to avoid hiring minorities because, as a practical matter, even in an at-will situation you must be able to show a good reason to safely discharge minorities. On the other hand, a policy that no employee will be discharged without good cause puts minorities and non-minorities on more equal footing in that you must have good reasons to fire anyone, and as a result, there is less incentive to avoid hiring minorities because of concerns about the difficulty of “safely” discharging them.<sup>35</sup> Also, there is evidence that some job applicants interpret at-will disclaimers quite literally as reserving the right to discriminate (“employees may be terminated for any reason”), and that at-will disclaimers in recruiting materials are particularly salient to minorities. Thus, the explicit at-will practice may have some negative impact on the organization’s ability to attract a diverse workforce.

Then Why is the Adoption of Aggressive At-Will Practices the Overwhelming Response?

A review of Table 5 quickly reveals that for the many companies, and especially those that espouse the respectful treatment of employees and the value of diversity, utilize high employee involvement work systems, and invest heavily in human capital, a strong case exists for the adoption of the good cause policy alternative. Then why have so few private sector American employers adopted such a policy without being essentially forced to do so by unions negotiating on behalf of employees? The short answer to this question is that very few employers have taken a strategic approach to the decision regarding what, if any, job security assurance should be given their employees. Instead, survey research tells us, the vast majority of employers have adopted aggressive at-will practices based “on advice of legal counsel.”<sup>36</sup>

A more in depth explanation of why adopting aggressive at-will practices is the overwhelming choice of non-unionized American employers returns us to our discussion of the primary antecedents of legal-centric decision making. Cognitive biases lead decision makers to unduly focus on avoiding perceived losses associated with wrongful discharge cases, losses which the media and many attorneys both inflate and make highly salient<sup>37</sup>. Whether due to perceived necessity, satisficing, or the pursuit of self-interest (shifting risk to another), managers and HR professionals turn to lawyers for “the answer.”

The typical lawyer, however, offers a biased legalistic perspective, lacking the expertise and, in some instances, the motivation to provide advice based on the strategic approach that has been described. Recognized limitations in the dominant model of legal training, and articles written by lawyers about the at-will issue, suggest that the range of non-legal considerations that should be considered anytime a decision is not dictated by clear and specific legal requirements are simply outside of the frame of reference of most lawyers providing employers legal counsel.

This observation is illustrated anecdotally by an experienced employment lawyer’s reaction when asked (by the first author of this article) about the extent to which the organization’s values and human resource concerns were taken into account when he recommended that his client adopt aggressive at-will practices: “What? Oh, yeah. That is really something the client needs to bring up. It’s up to them to decide how they want to handle that.” Finally, a further explanation for lawyers’ strong endorsement of aggressive at-will practices is that while such practices may not be the best way to address the strategic concerns of many employers, aggressive at-will practices do address a significant concern of lawyers representing employers by increasing the likelihood that if an implied contract claim is filed by a discharged employee, they will be able to defeat the claim and enjoy success in a highly public forum (i.e., it is a strategy that will help them win “the ultimate fight”).

### **Concluding Remarks**

Managers and human resource professionals express grave concern about the amount



of influence that the law and lawyers have on their ability to manage employees effectively. The foregoing analysis strongly suggests that the extent of the law's negative influence on the management of employees can be moderated significantly if organizational decision makers recognize their contribution to "the problem", focus on what is organizationally sensible rather than what is perceived to be legally defensible, and adopt a more strategic (less legal-centric) approach to the challenges posed by employment decisions that raise legal concerns. It is hoped that the information and guidance provided in this article will assist them in that endeavor.

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<sup>18</sup> *Soroka v. Dayton Hudson Corporation*, 235 Cal. App. 3<sup>rd</sup> 654 (1991).

<sup>19</sup> See, for example, Meyers, J. F. (1992) *Soroka v. Dayton Hudson Corp. - Is the Door Closing on Pre-Employment Testing of Applicants?* *Employee Relations Law Journal*, 17(4), 645-653; O Meara, D. P. Personality tests raise questions of legality and effectiveness *HRMagazine*, 39(1), 97-103.

<sup>20</sup> Estimating the per employee cost of a litigation threat is particularly useful for putting "headline verdicts" in context when the evaluated course of action is expected to both reduce a litigation threat, but also have a potential negative impact on a number of employee/non-legal concerns (decreased employee morale, or slightly decreased average job performance that would result from discontinuing a valid HR practice due to legal risks associated).

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