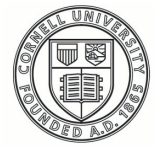

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Organizationally Sensible vs. Legal-Centric Approaches to Employment Decisions With Legal Implications

Mark V. Roehling
Michigan State University, roehling@msu.edu

Patrick M. Wright
Cornell University, pmw6@cornell.edu

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Abstract

This article is intended to: 1) alert human resource (HR) professionals to the risk that they, and the managers they serve, are unnecessarily contributing to the impact of legal considerations on the management of employees as a result of "legal-centric decision making"; and 2) provide information and guidance that will assist HR professionals in promoting better informed, more organizationally sensible responses to employment issues that have potential legal implications. The "legal-centric decision making" construct is introduced and illustrated, a model of the primary factors contributing to legal-centric decision making is presented, and keys to avoiding legal-centric decision making are identified and discussed.

Keywords

legal, employment, management, HR, professional, American, work, organization, law

Comments

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Mark V. Roehling
School of Industrial and
Labor Relations
Michigan State University
East Lansing, MI 48824
Phone: (517) 355-3335
Fax: (517) 355-7656
Email: roehling@msu.edu

Patrick Wright
School of Industrial and
Labor Relations
Cornell University
Ithaca, New York 14853
Phone: (607) 255-3429
Fax: (607) 255-1836
Email: pmw6@cornell.edu

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Abstract

This article is intended to: 1) alert human resource (HR) professionals to the risk that they, and the managers they serve, are unnecessarily contributing to the impact of legal considerations on the management of employees as a result of "legal-centric decision making"; and 2) provide information and guidance that will assist HR professionals in promoting better informed, more organizationally sensible responses to employment issues that have potential legal implications. The "legal-centric decision making" construct is introduced and illustrated, a model of the primary factors contributing to legal-centric decision making is presented, and keys to avoiding legal-centric decision making are identified and discussed.

Organizationally Sensible vs. Legal-Centric Approaches to Employment Decisions With Legal Implications

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, HR 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 competitiveness of U.S. companies (Laabs, 1994; Lande, 1998; Olsen, (1997).

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 (Ballam, 2000; Lande, 1998). 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 HR professionals to the risk that they, and the managers that they serve, 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 HR professionals in promoting better informed, more organizationally sensible responses to employment issues that have potential legal implications. A fundamental premise of this article is that as a result of legal-centric decision making, in many organizations 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 two sections. It begins with a discussion that focuses on legal-centric decision-making in employment matters: What is it? Why it is problematic? What factors contribute to its frequent occurrence? The second section provides information and practical advice aimed at promoting better informed (less legal-centric) 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.

Legal-Centric Decision Making Regarding Employment Matters

Defining the focal construct: What is Legal-Centric Decision Making?

We are introducing the term legal-centric decision making to refer 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 an American employer's 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 based solely on the advice of legal counsel, and 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 and HR professionals 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.

Table 1

Examples Of Legal-Centric Decisions Involving Employment Matters

The decision by a manager, human resource professional, or other employer agent to:

- Adopt an aggressive at-will policy (e.g., use of a formal at-will agreement and repeated disclaimers) without consideration of how the policy aligns with the company's espoused values or other non-legal considerations.
- Not use a valid selection device (e.g., personality testing) because of concern that if the selection device is used improperly, it may lead to litigation.
- Not collect data that might reveal racial or gender problems, or to otherwise not engage in self-evaluation, because the information could be used (at a later date) by a plaintiff-employee to establish a claim of employment discrimination.
- Avoid providing employees highly positive performance feedback because of concern that it might increase the risk of litigation if there is a subsequent need to discharge the employee.
- Proactively sanitize employee files to eliminate all documents that have the potential to be harmful if litigation arises, made without regard for the relevance of the information to performance management concerns or the potential identification of patterns of biased decision making.
- Not discharge an employee with documented, protracted unacceptable performance because the employee is a minority, or has threatened litigation.
- Insist on a formal legal release from an undisputed victim of harassment, or other forms of illegal discrimination, before agreeing to take steps to remedy the harm suffered by the victim.
- Counsel employees against socializing between men and women because of concern about potential sexual harassment claims.
- Not make a sexual harassment hot-line available to employees because of the concern that the failure to act on the information provided through the hot-line may, in some circumstances, help establish an employer's liability for harassing behavior.
- Discontinue the company's annual holiday party, over the objection of employees, because of concerns about legal liability.

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." (Sitkin & Bies, 1994, p. 28, emphasis added)

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 HR 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 (Dobbin, Sutton, Meyer, & Scott, 1993). 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 have a negative impact on employee morale by "flying in the face" of espoused organizational values.

Legal-centric decision making's characteristic focus on 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 this ironic outcome may come about. 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 implement a staffing policy that precluded female employees of child-bearing age from certain jobs that were considered high risk. While this decision 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[1]. More recently, some employers have adopted policies discouraging socializing between men and women as a way of reducing the risk of sexual harassment claims (Sturm, 2001). While such a policy may mitigate the risk of liability for sexual harassment, 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 (Sturm, 2001).

A common employer response to the implied contract exception to the American employment at-will doctrine provides a final example of how a focus on a salient litigation concern may increase the risk of less salient litigation risks. Briefly, that exception provides that although private sector employees are generally employed at-will (i.e., they may be discharged without a good reason), through their conduct and/or oral representations, employers may create an implied contract that employees will only be discharged for a good reason. Legal commentators have observed that while the aggressive practices many employers take to avoid creating an implied contract (e.g., requiring employees to sign "employment at-will" agreements) are effective at excluding implied contract claims, they may be increasing employers' net litigation risk because employees who feel that they were unfairly discharged will, in a sense, be forced to frame their claims as involving more costly illegal employment discrimination (e.g., sex, race, or age discrimination; McGowan, 1998).

Second, legal-centric decisions may increase an employer's risk of employment litigation by undermining trust and contributing to a legalistic workplace climate,[2] which in turn, increases the likelihood that employees will adopt legalistic responses to grievances experienced at work (e.g.,

consulting an attorney, pursuing a claim through an external agency). A poignant example of this tendency is provided by a case involving Heather (not her real name), a female employee who became very distraught when her manager's romantic interests became hostile toward her. She sought to address her concern through the company's 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 the evidence, the harasser did not offer a rebuttal. At this point the manager in charge of the investigation apologized to Heather on behalf of the company, and sought her input regarding what she 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 Heather 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 the harasser.

Before implementing the informal agreement, the manager in charge decided to "run it by legal." The lawyer who was consulted agreed that Heather's request was more than reasonable 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. 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 a formal release before the full extent her current and potential future damages was thoroughly evaluated. She retained the attorney, 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 (Bisom-Rapp, 1999). 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 (Bisom-Rapp, 1999). Where there are systemic problems, following a legal-centric approach is like treating the salient symptoms of cancer (e.g., giving medication to lessen or avoid the pain associated with the cancer), while allowing the underlying cancer to grow and increase its negative affects on the patient's well being.

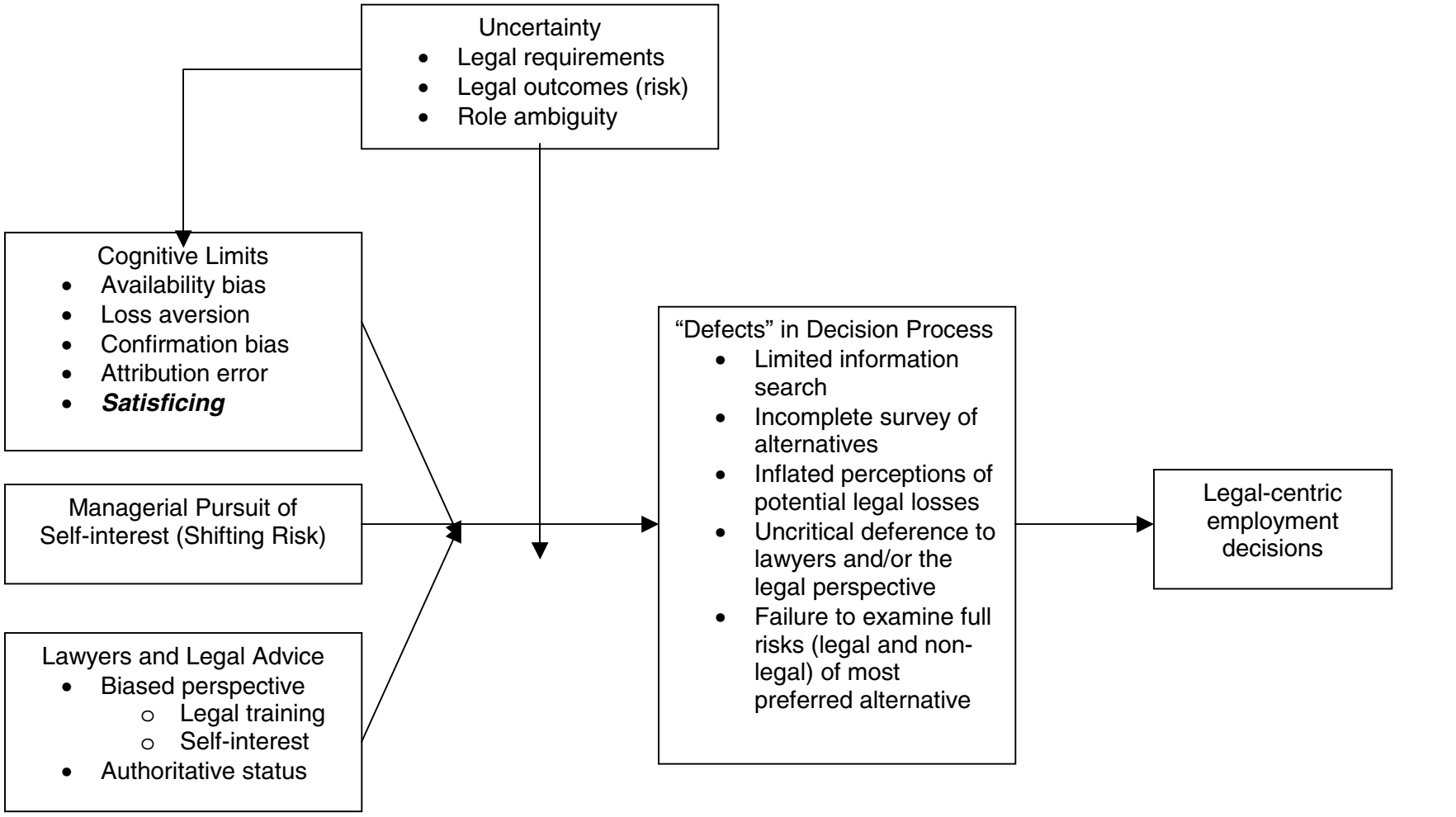
In summary, legal-centric decision making is problematic because it is dominated by perceptions of what is legally defensible rather than concern for what is organizationally sensible, and as a result, it poses a serious threat to the organization's overall effective management of employees. Moreover, 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 organizational decision-makers (e.g., managers, HR professionals) often 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, often 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.

Figure 1
Primary Factors And Conditions Contributing
To Legal-Centric Employment Decisions



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; Wagner & Hollenbeck, 2002). 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 employment decision-making would not occur if managers and HR professionals 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 decision-makers have neither unlimited cognitive capacity nor unlimited resources to address the issues that may confront them. As a result, organizational 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 that decision makers faced with cognitively demanding decisions invoke simplifying heuristics, or mental shortcuts, that result in a number predictable decision making biases (Tverksy & Kahneman, 1974). 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 (Myers, 2001). The operation of availability bias means that even if managers and HR professionals 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 information that is skewed heavily in the direction of inflating the risk of litigation. For example, a content analysis of HR 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)(Edelman, Abraham, & Erlanger, 1992).[3] Other research indicates that lawyers share an inflated perception of litigation risk[4], 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 (Tversky & Kahneman, 1981). 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 coincidently, 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 (Wason, 1981). 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 (Bettman & Weitz, 1983), 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 *satisificing*, or settling for a decision alternative that meets some minimum level of acceptability (Simon, 1976). Satisficing is most likely to contribute to legal-centric decision 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 employment decision making. The strategic approach that we will be discussing incorporates a number of those steps.

Decision-maker self-interest. Cognitive biases and *satisificing* 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 (Linowitz & Mayer, 1994).[5]

Biased perspective and dominant role of lawyers. With some exceptions, found most commonly among in-house legal counsel, 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, most lawyers provide input that focuses on legal considerations and legalistic solutions (Sturm, 2001). 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 (Langevoort, 1997; Riskin, 2002).

This biased perspective is attributable to two factors, the nature of legal training and the influence of lawyer's self-interest (Linowitz & Mayer, 1994; Sturm, 2001). 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 (Marguilies, 1990), 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, "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"(Sturm, 1997, p. 121). 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 legal 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 (Connolly, 2003). 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 (Langevoort, 1997; Riskin, 2002). 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 (Lande, 1998). 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 describes a model that should help 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), 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.

Table 2: Comparison Of Legal-Centric Versus Strategic Approaches To Employment Decisions With Legal Implications.

Factor	Legal-Centric Approach	Strategic Approach
The mission and values of the organization.	Not relevant	Highly relevant
Impact on HRM concerns (e.g., attraction, retention, desired nature of employer-employee relations).	Not relevant	Highly relevant
Legal considerations.	Highly relevant (focus on salient legal threats, producing favorable evidence, and defeating claims)	Highly relevant (considers immediate and long-term legal threats; greater focus on avoiding claims by addressing underlying causes)
Bottom-line impact on organizational competitiveness.	Relevant (focus on costs of protracted litigation and legal judgments)	Highly relevant (considers all legal costs and impact of decision on human resources as a source of competitive advantage)

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 (Locke &Latham, 1990). 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.

Table 3

Examples Of Goals That May Be Relevant To Employers Adopting A Strategic Approach To Decisions Regarding Employment Policies And Practices

1) Meet all applicable legal requirements.
2) Promote critical attitudes and behaviors implied by our business strategy.
3) Adopt policies and practices that are consistent with our expressed values (e.g., respectful treatment stakeholders, ethical behavior).
4) Promote the attraction and retention of talent.
5) Promote diversity at all levels of our workforce.
6) Minimize litigation related costs.

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.

Table 4
Sample Specification Of Roles In Strategic Approach
To Employment Decisions With Legal Implications

Participant	Primary Responsibilities
Manager	• Explicitly establish and communicate criteria for effective decision (based on relevant organizational goals). • Make sure that participants have an accurate understanding of their respective roles. • Actively solicit expertise/input from other participants. • If consensus not arrived at, make final decision.
HR Professional	• Inquire as to the specific nature of any legal concerns that arise (legal requirements versus litigation risk). • Assess the extent to which the contemplated course(s) of action is/are consistent with the organization's values and culture, and provide input. • Assess impact of contemplated course(s) of action on other human resource concerns (e.g., attraction and retention, critical employee attitudes and behaviors) and provide input.
Lawyer	• Assess the specific nature of legal concerns that arise (legal requirements versus litigation risk) and communicate assessment to other participants. • Provide expert judgment regarding the magnitude of the litigation risk identified as associated with contemplated course(s) of action.
Participants	**Common Responsibilities**
Manager, HR Profess-ional, and Lawyer	• Critically evaluate and, when appropriate constructively challenge, the input provided by other participants. • Focus attention/analysis on avoiding legal claims rather than defeating legal claims after they have arisen. • 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.

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 a 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. For example, although many practitioner-oriented articles create the general impression that the law requires an aggressive response to the growing number of judicially recognized exceptions to the American employment at will doctrine (e.g., the implied contract exception), the at-will policy decision is not a matter of legal requirements. Employers are free to decide whether to take affirmative steps to preserve the at-will status of employees (e.g., at-will agreements signed by employees), or provide employee greater security from discharge, or do nothing at all.

Between those employment decisions that are governed by clear and specific legal requirements, and those that are clearly not a matter of legal requirements, there 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.

In some situations, experienced HR professionals have sufficient knowledge of basic employment law to determine whether a decision involves clear legal requirements. However, there will be many occasions where a lawyer's superior legal expertise is called for. When

lawyers are consulted, they should not be counted on to provide sufficiently specific guidance regarding the nature of legal concerns involved without prompting. Therefore, we suggest that a non-lawyer participating in the employment decision-making process who is likely to have some knowledge of employment law, typically the HR professional, 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, 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 (Meyers, 1992; O'Meara, 1994), 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 6-7).

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, televisions 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. For example, at a time when many HR 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." (Dertousos & Karoly, 1992, p. 64)

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 demonstrate incremental validity (i.e., they make a unique contribution to enhancing the employer's ability to predict who will be successful employees; Heneman & Judge, 2002). 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 consider adding the use of a validated personality test (Heneman & Judge, 2002).

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 tests 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 HR 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 manager or 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 do, 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 (Baron & Kreps, 1999). 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. By way of example, the following identifies the kinds of consistency issues that may exist when an employer considers the common lawyer recommendation that American employers have an explicit, formal employment at-will policy. If the organization' mission or value statement emphasize the importance of employees, then research suggests that a policy that reserves the right to discharge employees "with or without good cause" may create an inconsistency and mistrust in the eyes of many employees (Roehling & Winters, 2000). If the organizational culture emphasizes egalitarianism, the adoption of an at-will policy for 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 (Radin & Werhane, 1996), 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?

Concluding Remarks

Managers and HR 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.

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Endnotes

[1] See *UAW vs. Johnson Controls Inc.*, 499 U.S. 187 (1991), a landmark U.S. Supreme Court decision holding that a company's fetal protection policy constituted illegal disparate treatment sex discrimination against women.

[2] For example, Roehling and Winters (2000) found that an employer's use of formal employment at-will agreements lead some participants in the study in infer that the employer was less trustworthy.

[3] Examples of other studies documenting the media's tendency to inflate the risk of litigation include: Chase(1995), a study finding that jury awards reported in New York newspapers were 16.5 times as large as the average jury award based on data provided by New York Jury Verdict Reports; and Garber (1998), a study of newspaper coverage of verdicts in automobile product liability cases finding that a verdict in favor of the plaintiff is 12 times more likely to be reported in newspapers than a verdict for the defendant.

[4] For example, Singer (1988) found that South Carolina lawyers participating in the study overestimated the percent of tort cases won by plaintiffs and the size of the awards.

[5]As one HR executive noted (in a personal communication with the first author) 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."