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Lessons Learned from the Courtroom: Employment Litigation Challenges and Opportunities (*Unmuting the Jury*)



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Stephanie Karn, Esquire, KVCF
Jill Huntley Taylor, Ph.D., Taylor Trial Consulting

Moderator: Neil Hamburg, Esquire, Hamburg Law Group



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Trends

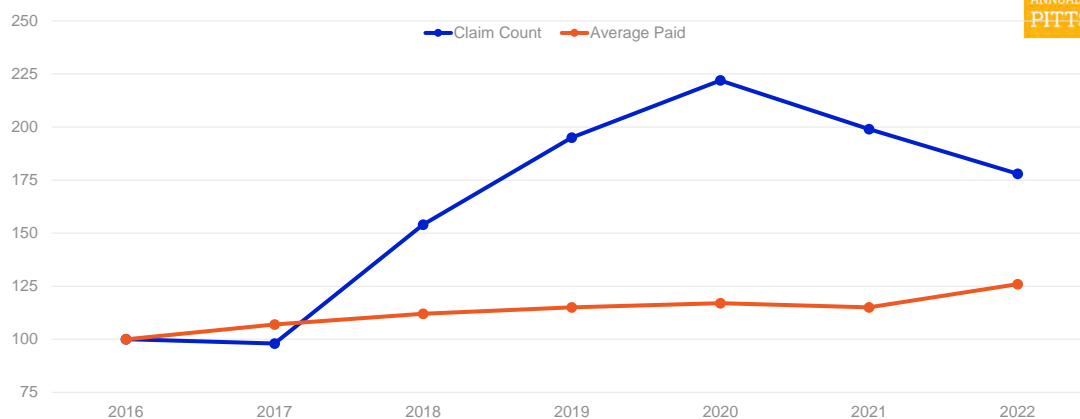
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Three-Year Moving Average Trend for ELL Claims < \$2 Million By Closed Year (Percent of 2016 Value)

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Source: United Educators

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Leading Causes of Loss



Cause of Loss	Portion of Claims	Severity Increase Over Five Years* (2016 vs. 2022 YTD)
Discrimination — all types	60%	+21%
Breach of contract	10%	+49%
Wrongful termination	5%	+53%

*Using ELL claims < \$2 million by closed year

Source: United Educators

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The Black Lives Matter logo, featuring the text "BLACK LIVES MATTER" in white, bold, sans-serif capital letters on a black rectangular background.

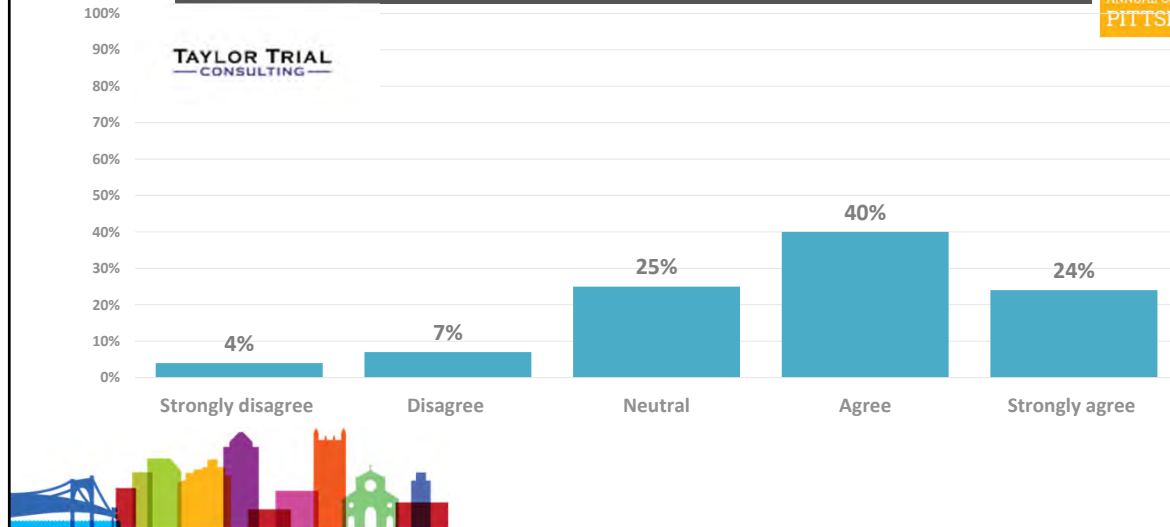
The Me Too logo, featuring the text "#MeToo" in white, bold, sans-serif capital letters on a dark purple rectangular background, with several colorful hands raised in the background.

The logo for the NACUA 2022 Annual Conference in Pittsburgh, featuring the NACUA logo, the dates June 26-29, and the text "2022 ANNUAL CONFERENCE PITTSBURGH".

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Creating a more diverse workforce is an important goal for companies.

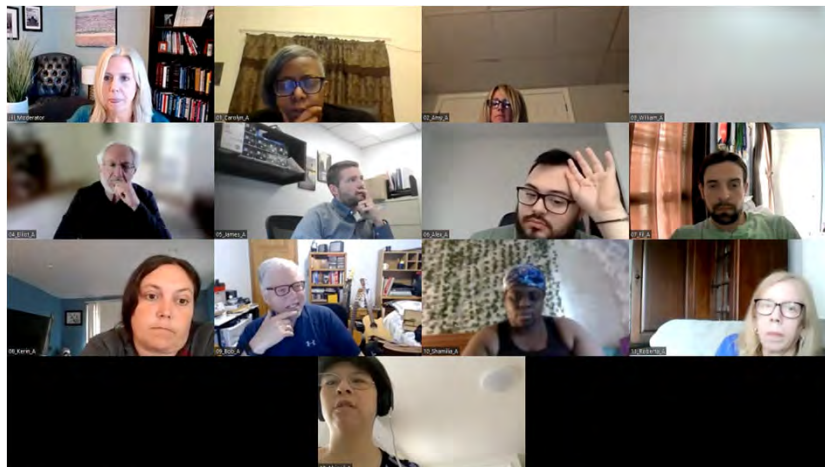
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Jurors: In their own words.....Ready for Real Race Talk

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Actions to Help Prevent Race Discrimination

Fix policies and procedures that perpetuate systemic discrimination.

Improve recruitment, hiring, and promotion practices.

Create a culture of respect through education and training.

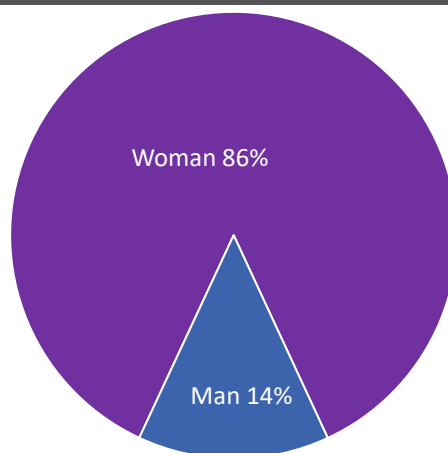


Source: United Educators

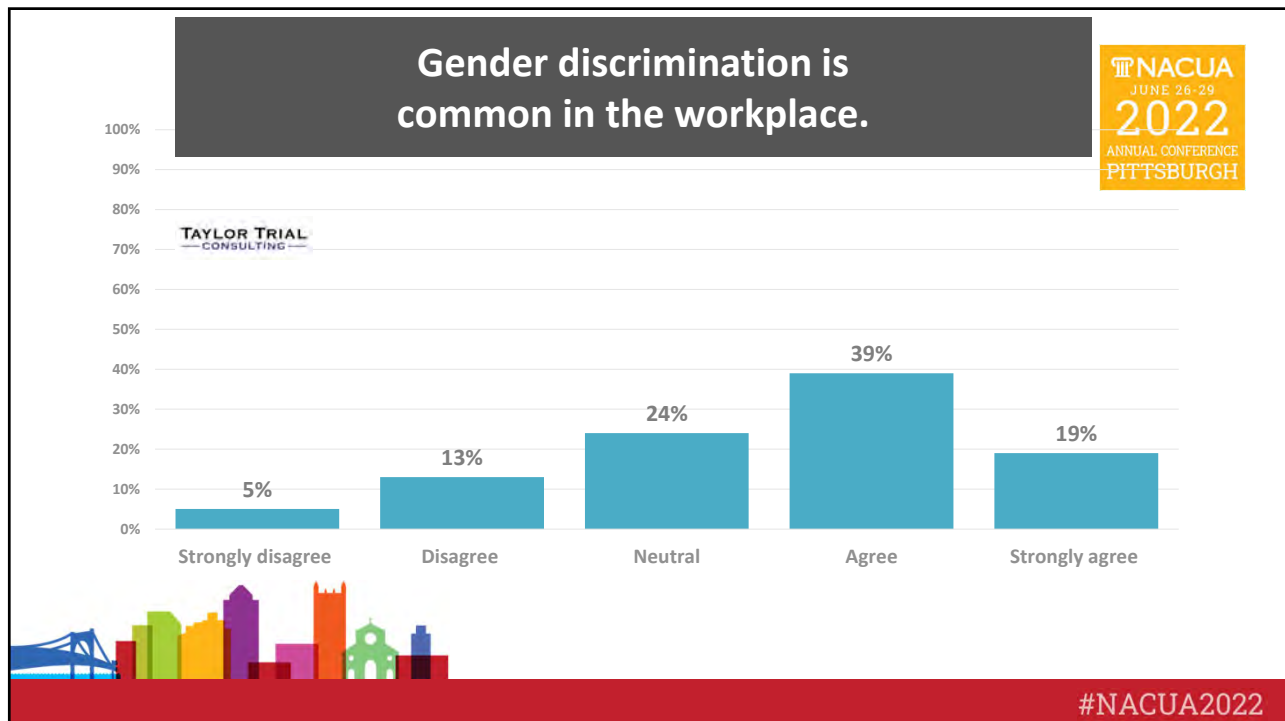
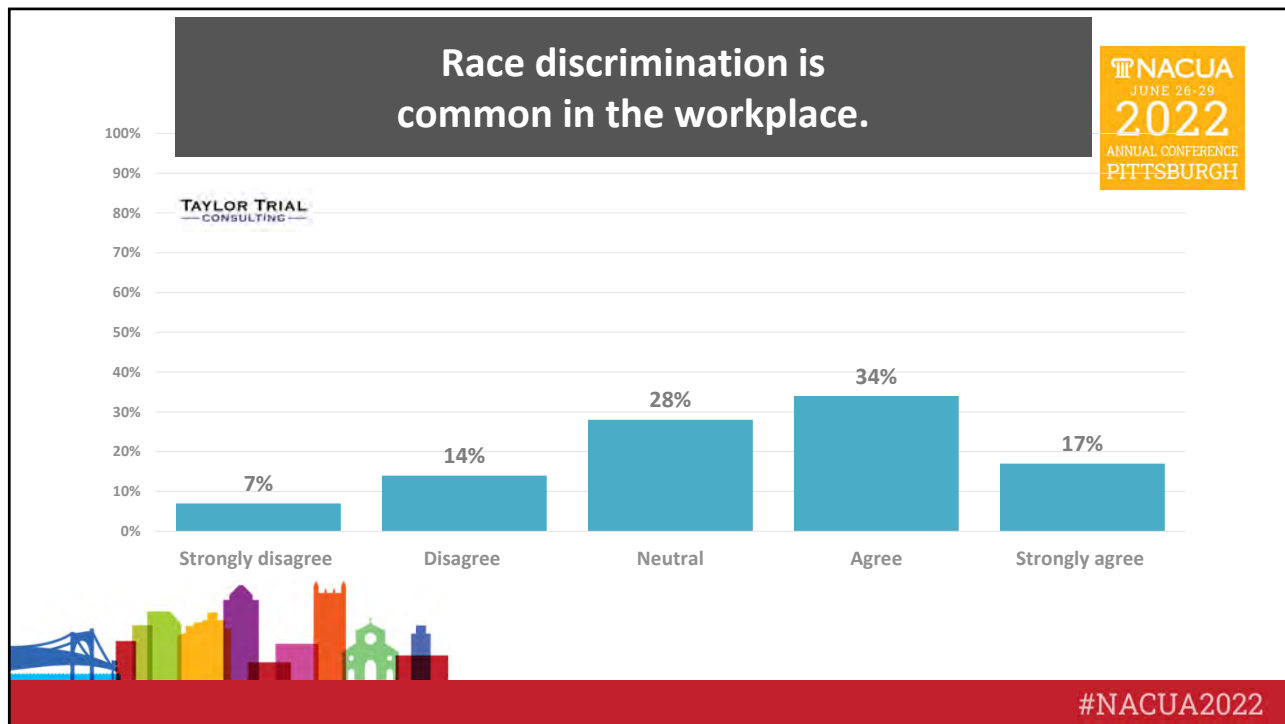
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In a dispute between a woman claiming sexual harassment and a man she works with, who would you tend to believe?

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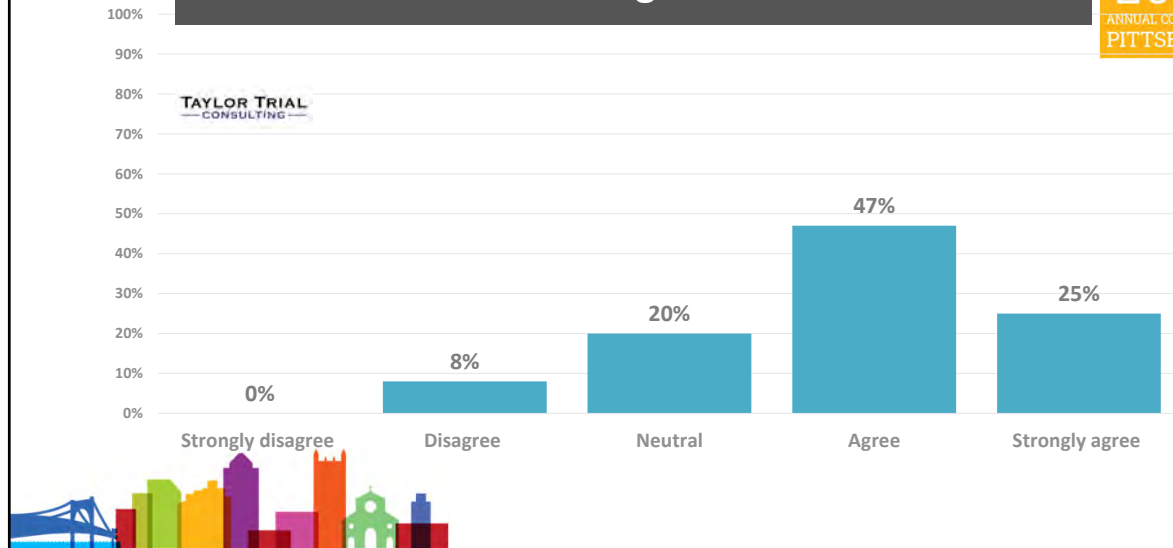


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Employers should not consider race in hiring decisions.

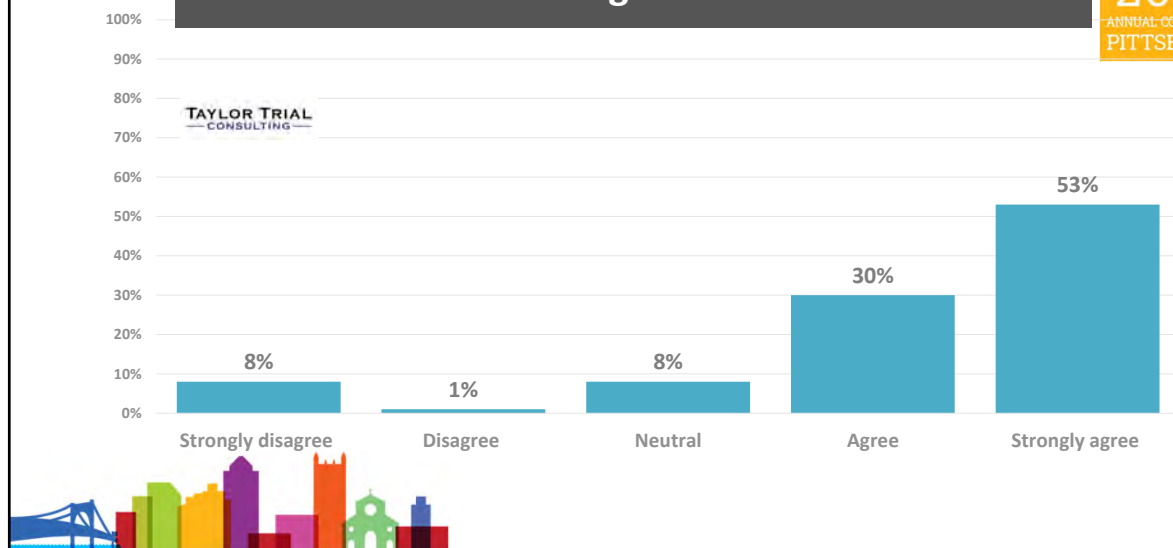
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Companies should hire the most qualified candidates regardless of race.

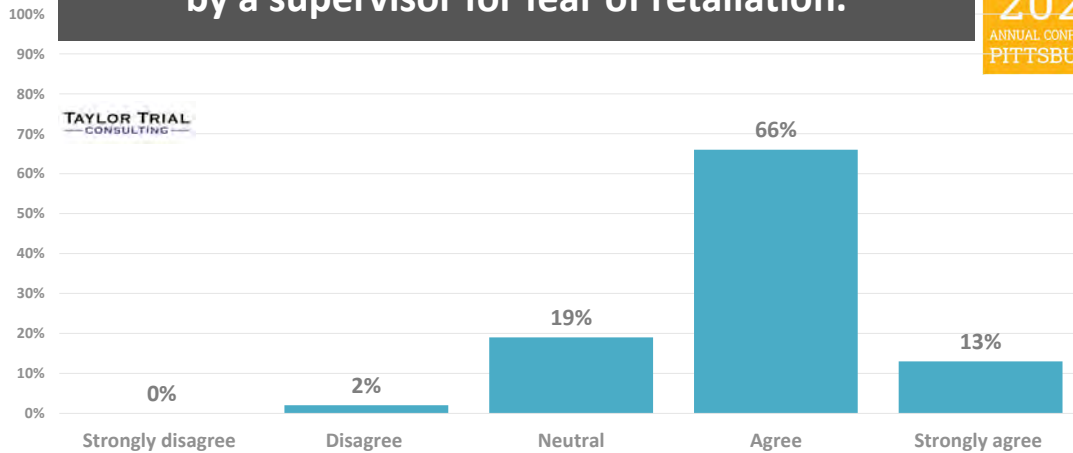
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Employees often do not report sexual harassment by a supervisor for fear of retaliation.

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Jurors: In their own words...Fear of Retaliation

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Jurors: In their own words.....Retaliation is Real, Bad Employees Included

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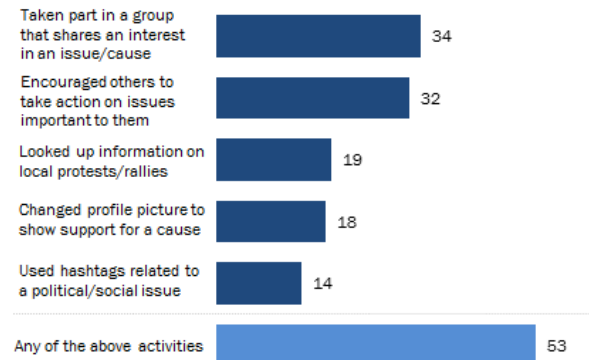
Increasing Levels of Activism



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Roughly half of Americans have been civically active on social media in the past year

% of U.S. adults who say they have done the following activities on social media in the past year



Note: Respondents who gave other responses or did not give an answer are not shown.
Source: Survey of U.S. adults conducted May 29-June 11, 2018.
"Activism in the Social Media Age"

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These Activist-Jurors are Ripe for Reptiles:

Tell jurors that they were "chosen"

Against all odds, reminding them of all the people called to jury duty, rhetorically asking who knows why it worked out that way...something put you here for a reason, etc. (p.159)



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Growing Expectations for Transparency

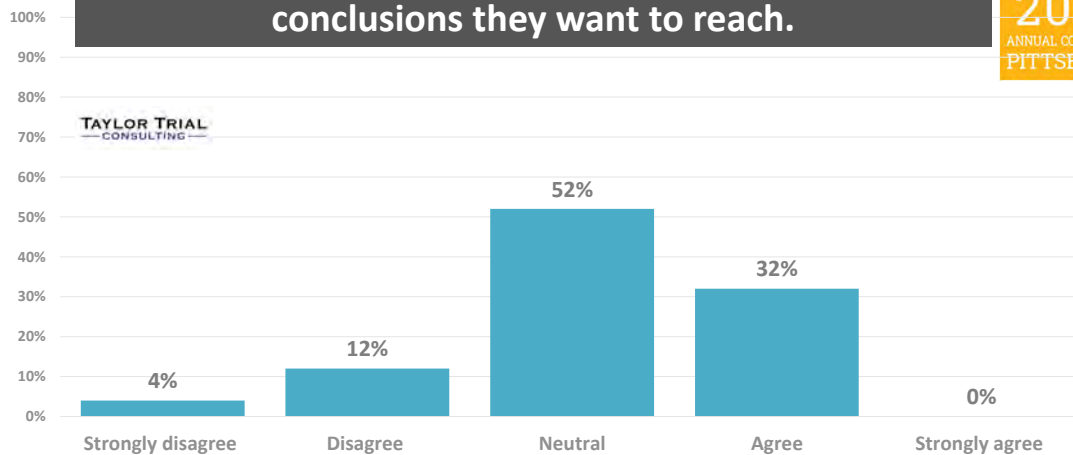
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When companies conduct investigations into
discrimination complaints, they often reach the
conclusions they want to reach.

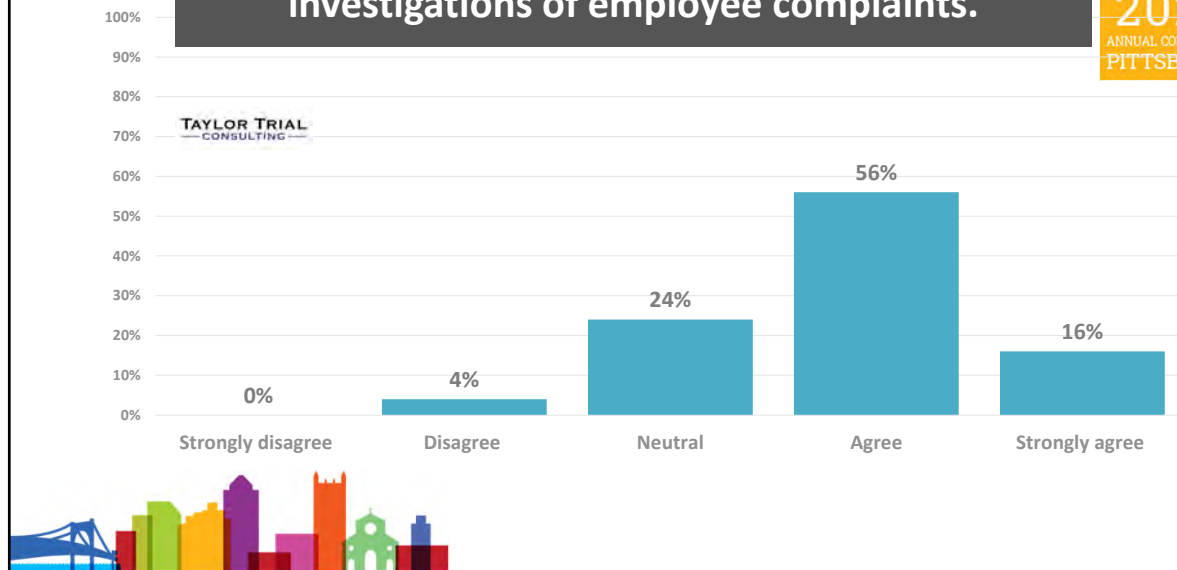
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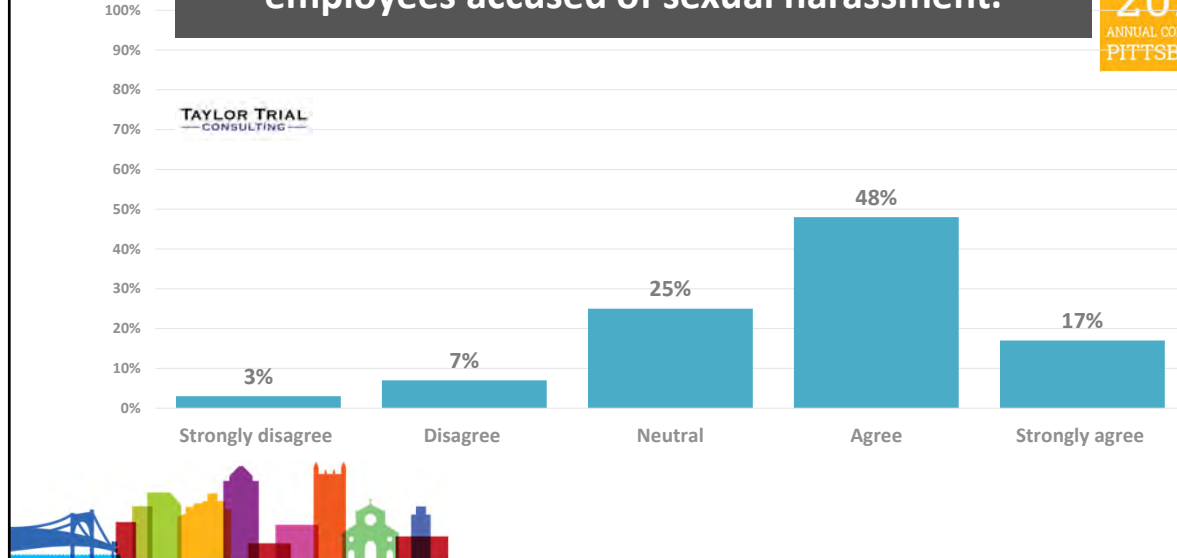
Outside investigators should be hired to handle investigations of employee complaints.

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In general, employees too often protect powerful employees accused of sexual harassment.

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Unmute

Progressive Discipline: No Good Deed Goes Unpunished

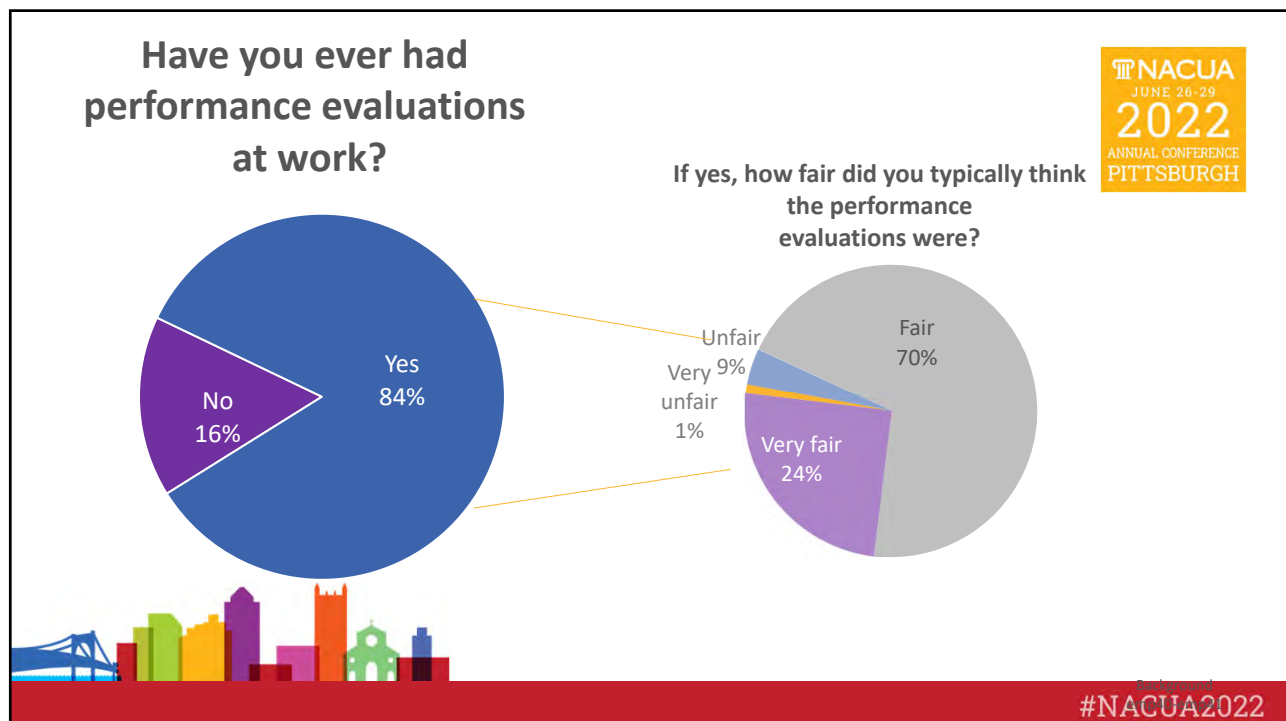
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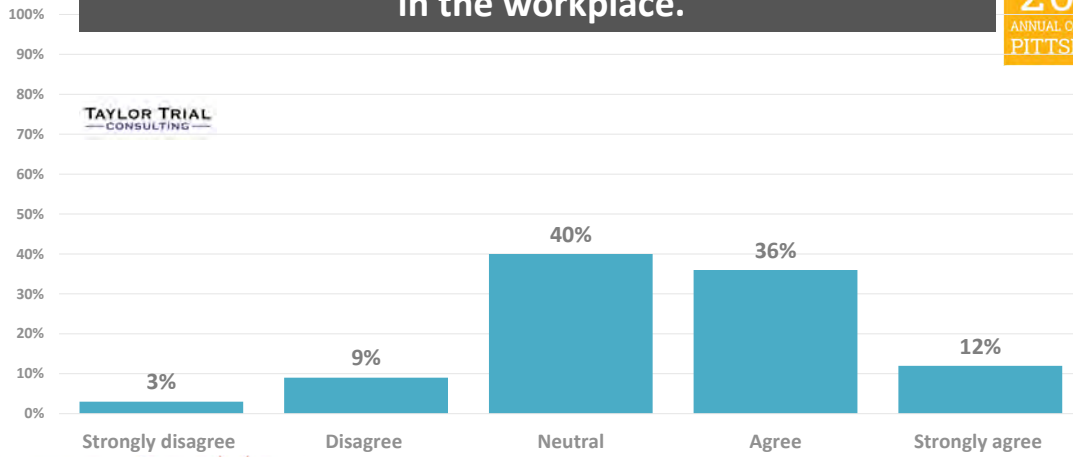
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Very Good	<input type="checkbox"/>
Good	<input type="checkbox"/>
Average	<input checked="" type="checkbox"/>
Poor	<input type="checkbox"/>



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**Employee performance reviews are a good indication
of how an employee is performing
in the workplace.**

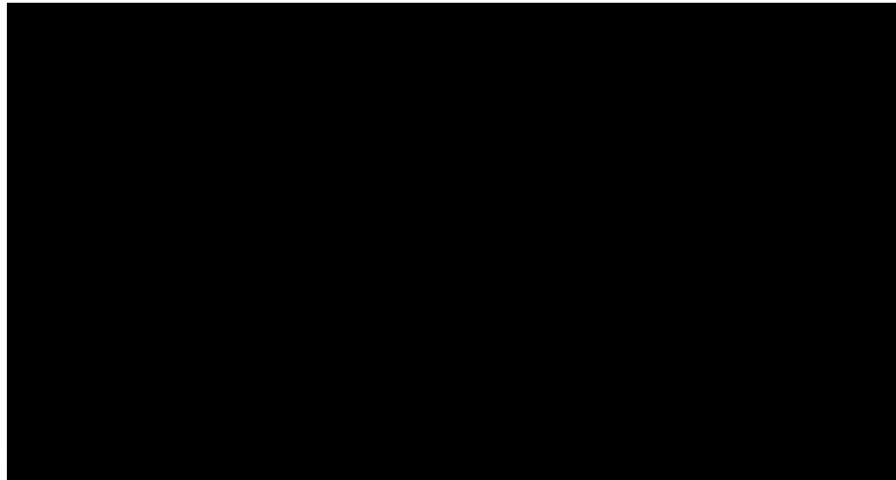


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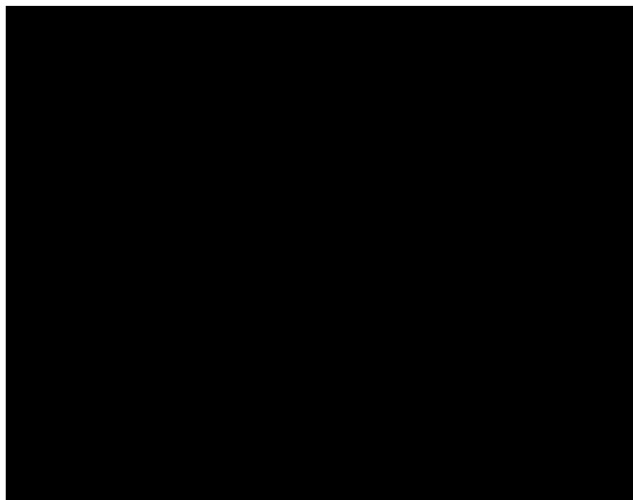
**Jurors: In their own words...Another chance, no
good deed**



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Jurors: In their own words...Performance reviews

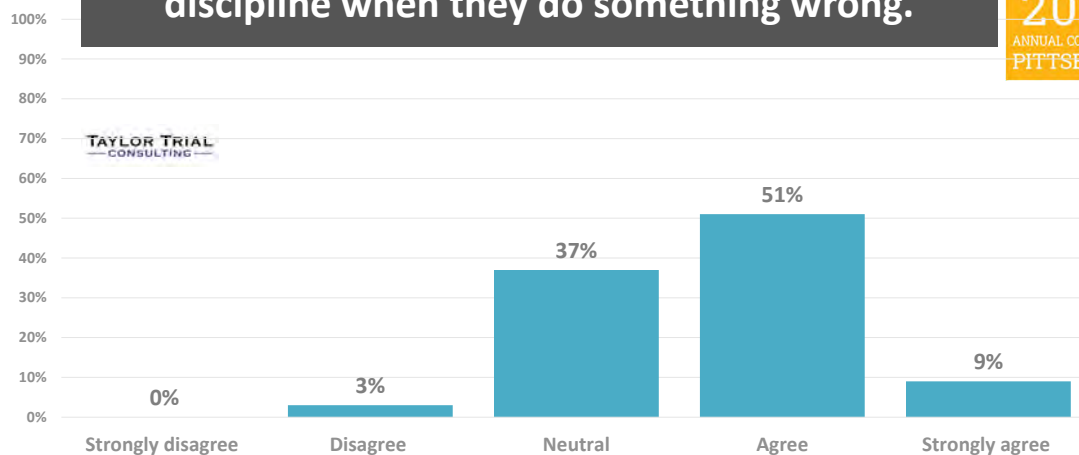
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Employers should give employees progressive discipline when they do something wrong.

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Jurors: In their own words..... Progressive discipline

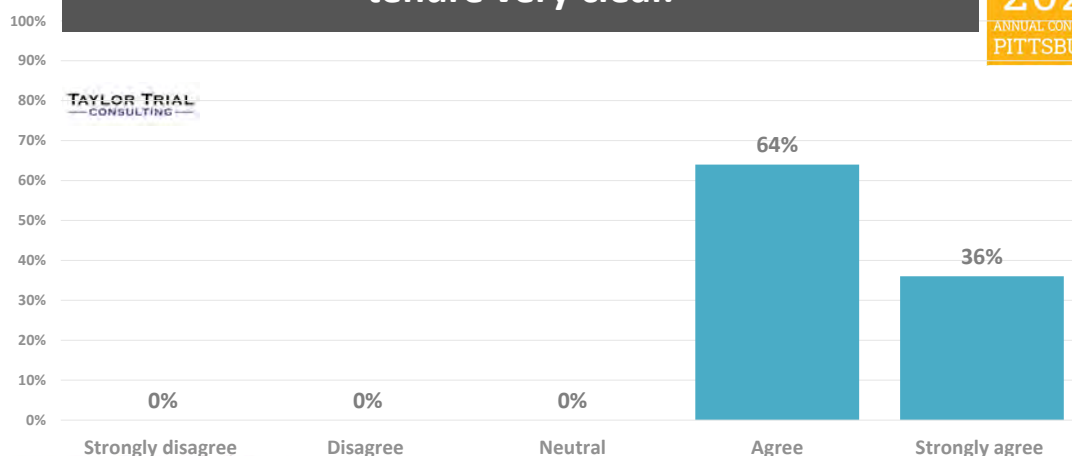
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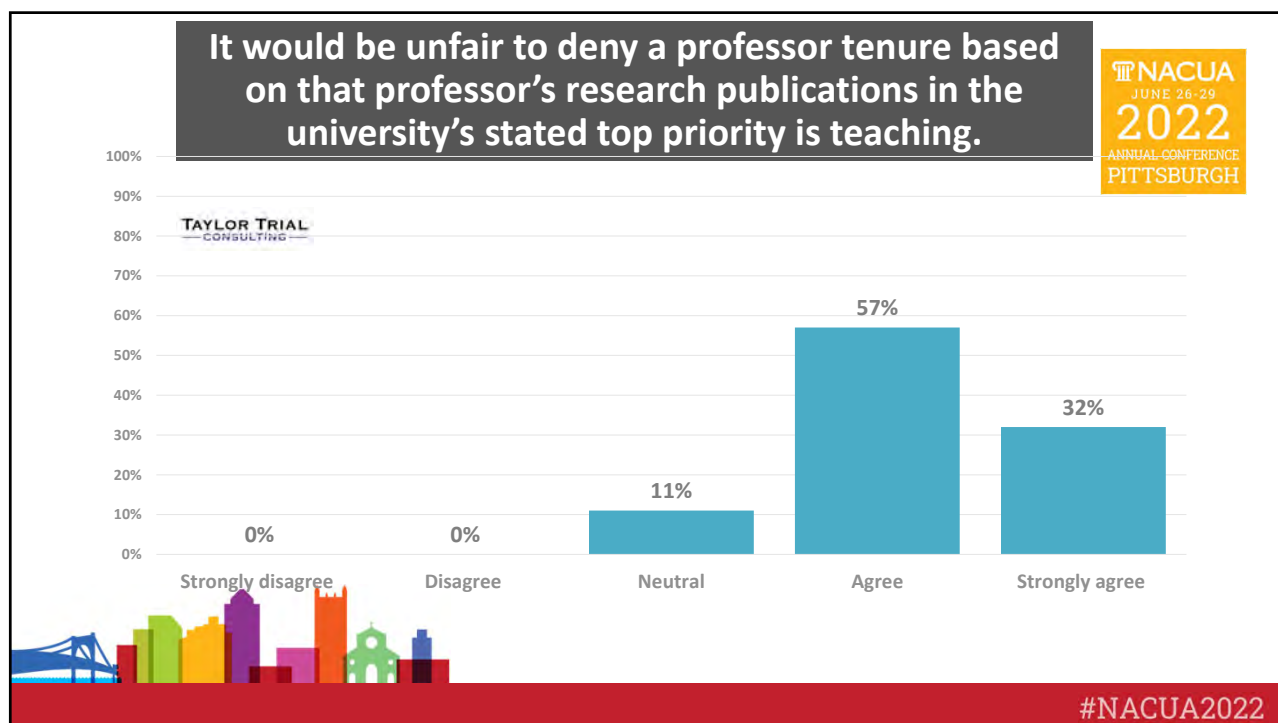
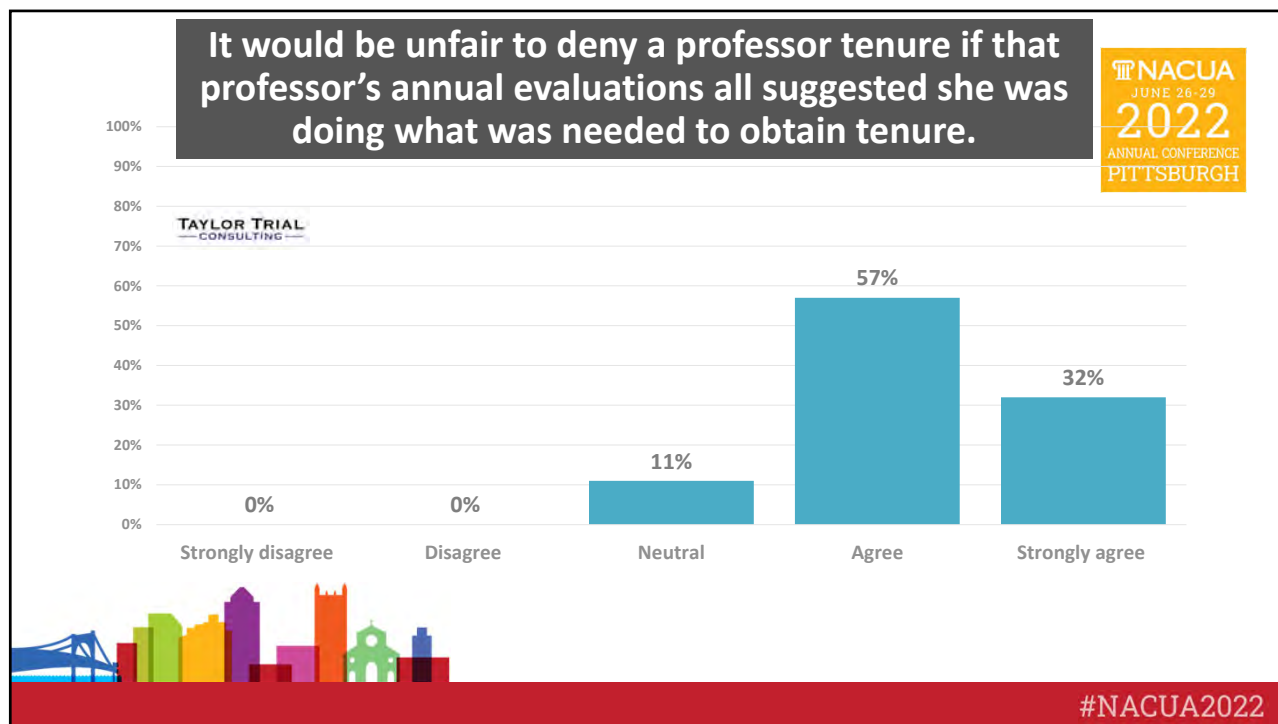
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Universities should make the criteria for achieving
tenure very clear.

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Background Checks



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Background Check Fundamentals

- A 2019 benchmark report by [HireRight](#) found that background checks uncovered significant discrepancies and misrepresentations by candidates, primarily with respect to criminal convictions, but also with motor vehicle records, employment histories, and educational credentials.
- About 71% of organizations reported that background checks uncovered issues they wouldn't have known about otherwise. The report found that conducting background checks is a key risk mitigation strategy, as it improves the quality of hires and reduces organizational risk.
- Background checks of candidates, employees, and certain non-employee groups is a crucial risk mitigation practice for educational institutions.



Source:  United Educators

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Background Check Fundamentals



- Institutions must select the appropriate screenings, ensuring that the chosen checks comply with local and federal law and don't discriminate against applicants or employees.
- Background investigations may include checks or verification of the following records:

Source: United Educators



- State and federal criminal record databases
- Name/alias
- Social Security number trace
- Residence history
- Current and prior employment
- Professional licensure
- Education
- State and federal sexual registries
- Child and elder abuse registries
- Reference checks
- Motor vehicle history
- Credit history
- Psychological and physical examinations
- Drug and alcohol testing
- Social media accounts and online presence

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Source: United Educators

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Important Considerations Before Conducting Background Checks



- Check timing.
- Consult with legal counsel to ensure compliance with laws applicable to your institution.
- Obtain proper authorization.
- Keep background information secure.
- Use a third-party provider.



Source: United Educators

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Lessons Learned From Wrongful Termination Claims in Discrimination Cases



- Act promptly.
- Emphasize fairness.
- Carefully consider all dismissals.
- Review contract details.
- Take special care with group separations.
- Separate employees with compassion.



Source: United Educators

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Recommendations Checklist



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Checklist: Assessing Your Employee Performance Evaluation System



Do you periodically assess your institution's employee performance evaluation system?

If not, consider doing so regularly (every three to five years).



Source:  United Educators

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Checklist: Assessing Your Employee Performance Evaluation System



A good place to begin evaluating your employee performance system is by considering the following:

- Does your institution mandate performance evaluations for all employees?
- Does the institution use its performance evaluation system for:
 - Termination decisions?
 - Employee discipline?
 - Determining layoff candidates?
 - Promotions?
 - Salary adjustments?
 - Bonus eligibility?
 - Employee professional development?



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Checklist: Assessing Your Employee Performance Evaluation System



A good place to begin evaluating your employee performance system is by considering the following:

- Do your employee handbooks and policies describe the performance evaluation system and explain how it is used?
- Is your performance evaluation system centralized, with oversight by Human Resources (HR)?



Source: United Educators

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