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# 2017: Labor & Employment in For Major Transition

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# The Transition Defined

# Where We Were

- For the last 8 years, we operated in a climate of regulatory gotcha
- Regulatory agencies actively sought to identify technical rule violations in order to assess penalties and fines
  - And generate media attention
- To make it even more difficult, the agencies repeatedly changed the guidance or the rules and then promptly instituted enforcement
  - This was especially true for wage and hour



# Where We Are Going

- The pace of new rule making change will slow enormously/halt
- Many proposed or recently enacted rules will be scrapped
  - White Collar salary basis test
  - Joint Employer test
  - Blacklisting Rule
  - Persuader Rule
  - Enhanced EEO-1 Reporting Obligations
  - Affordable Care Act
- But that will take several years

# Candidates for Rule Changes

- Scrap the joint employer rule
- Incentive programs do not affect overtime premiums
  - Including for safety
- Loosening the duties test for white collar exemptions
- Less requirements for federal contractors
- Uphold use of arbitration & class action waiver

# What Does that Mean for Right Now?

- For several years, we can expect dramatically scaled back federal regulatory enforcement and expansion.
- That makes the next 18 months an ideal opportunity to experiment with labor and operational changes in preparation for the real challenges to come.
  - What's the real challenge?
  - Staying alive against your competition.



So Nothing More to Worry About?

# Who Wants Federal Work?

- In February, President Trump promised \$1 Trillion of infrastructure spending
  - A lot of that will be for construction
- Many GC's must comply with either Service Contract Act or Davis Bacon
  - As a sub, you are required to maintain a written Affirmative Action plan
  - Must also pay the prevailing wage rate
  - Your GC is responsible for you (read the contract)

# Immigration Update

- Less. Both legal and illegal.
- Will further drive wage inflation as low skilled labor availability shrinks
- Also, expect more I-9 audits

# I-9 Audits

- The one area where we should expect greater enforcement
  - Always part of an OFCCP audit
- Remember 2 types of violations:
  - Paperwork
  - Employing an undocumented

# Keeping an Eye on The States



# State Agency Activities

- If you live in a blue state, expect your state agencies to be even more aggressive over the next few years
- Many of them are able to generate revenue for their agencies through enforcement activities
- And many states already have little known employment statutes on the books that they can surprise you with
  - In Oregon, it is illegal for an employee in a manufacturing facility to work more than 13 hours per day

## The State Minimum Wages

# How Are You Affected?

- Directly
  - EEs making minimum wage get raises
  - Who else will get a bump?
  - Fewer entry applicants unless you increase wage rates to pay more than Starbucks
    - Admins/Office?
- Indirectly
  - What about your suppliers?
  - Can they afford the increases?
  - When they are affected, how are you affected?

# Also Think About

- Hourly contribution rates (Pension/H&W)
  - Quick: in your head: how much are you paying into pension & H&W?
    - Is it more than \$8?
- Unemployment Insurance Costs
- PTO/Holidays now more expensive

# Final Thoughts on the Minimum Wage



# And Coming Next, Paid Sick Leave

- California, Connecticut, Massachusetts, Oregon, and Vermont have statewide paid sick leave laws.
- Arizona's and Washington's paid sick leave laws begin in July 2017 and January 2018.
- Approximately 20 cities have enacted paid sick leave ordinances.

# A Long Term Labor Outlook

# Long Term Projection is Hard

- Start with acknowledging things you can't change
- Draw some strategic conclusions
- Making some tactical recommendations

# Things We Cannot Change: Low Wage Labor Costs More than Ever

- The cost of labor is increasing (duh). But proportionally, no where is that increase greater than in low wage labor.
  - That's what increasing the minimum wage does.
  - And why economists argue it hurts the poor the most.
- Then add the costs from ACA mandated health insurance, unemployment premiums, workers' comp, and employment litigation.
- Conclusion: low wage labor is becoming less economically efficient.

# Things We Cannot Change: Labor Force Participation Declines

- Higher wages and fewer people entering the workforce
- In the medium term, will tighten the labor supply
- Market to keep your best people is already fierce



# Industry Shift Toward Pre-Fab

- More and more contractors are shifting to a Pre-Fab model
- Replacing the need for complicated assembly of parts at the job site

# What Jobs *Will* You Be Hiring For?

- Journeyman Electrician?  
Electrical Helper?
- Or Machine Operator?  
Programmer? CAD drafter?
- Those are fundamentally  
different jobs categories
- Greater emphasis on  
manufacturing, assembly, and  
programming rather than purely  
on electrical work

# Focus on Targeted Hiring

- Where do you find most of your employees?
  - Hiring Hall
  - Word of mouth
- How many of your future employees will come from Hiring Halls?
  - Work with your Local about your needs
- But also think about where you are already getting your good people
  - Going back to the well

# The Competitive Transition

- Away from low wage labor
- Towards automation, technology and a Pre-Fab model
- Being competitive means finding ways to do the same work with less hours
  - Labor usage plans are more important than ever
  - Have your best person on it

# Best Practices Top 5 6

# #6 – Don't Forget About Your Office Employees

- Office employees can sue you for wage and hour violations the same as the electricians
- Consider arbitration agreements with class action waivers
  - If you don't have them, be aware that the Supreme Court is taking a look at their validity in the Ernest & Young case.
  - If Neil Gorsuch is confirmed, it is likely they will be upheld.



# Using Employment Agreements

- The Basics:
  - Non-competes, No Solicitation of Customers, Confidentiality, etc.
- Advanced:
  - Address retention issues in key positions with renewable employment contracts
  - Trade job security for EE loyalty
  - Establish clear performance metrics with bonuses tied to outcomes

# #5 – Have the Policy In Writing

- If you want to enforce discipline, you want to have a written policy that the EE has been given a copy of
- Don't just rely on your collective bargaining agreement
  - If the CBA is silent on it, then there isn't a rule on it
- White collar employees aren't covered by the CBA

# Employment Handbook Must Haves

- The Basics:
  - Attendance
  - Appearance
  - Sexual Harassment Reporting Policy!
  - Equal Employment Opportunity policy
  - Drug Testing
  - For cause issues

# ...but I Like the Grey Area

- Grey area = I want to make exceptions for certain employees I like (or are high performers)
- Enforcing policies inconsistently is how discrimination lawsuits are proven
  - e.g. Female Admin v. Male Key Estimator

# #4 – Managing The Fleet

- Best Practices:
  - Yearly MVRs for all drivers
  - Yearly driver safety course
  - Prohibition on digital devices (or hands free)
    - Have this policy personally signed

# Monitor the Fleet?

- Telematics:
  - Do you want to know where your trucks are being driven?
  - Do you want to know how they are being driven?
  - If you were a juror, would you expect a contractor to have it?



# Remember the Whole Fleet

- And don't forget about your superintendents:
  - What are your written policies on personal use of company trucks?
    - Assume total liability
  - Do you expressly ban use by family members

# Train for Post-Accident

- Train your drivers
- After an accident do they:
  - Cooperate and give a statement
  - Do not give a statement
  - Submit to breath/blood test, if optional
- Either can work but only training will make it happen

# #3 – Beware of Anti-Competitive Behavior

- DOJ plans to take criminal action against naked wage-fixing or no-poaching agreements.
- Wage-fixing: when you and your neighbor discuss mutual wage rates in order to keep wage rates down
- No-poaching agreements
- Other Anti-competitive behavior

## #2 – Don't Forget to Adjust Overtime

- The Low Hanging fruit of Wage and Hour liability
- Attendance bonuses, Safety “raffles,” Production bonuses, etc.
- You must recalculate their Regular Rate of pay for overtime purposes

# #1 – Misclassification

- Continues to be a major headache
  - Is your sales team exempt?
  - Is your Project Manager really an exempt supervisor?
  - Should your Estimators/Purchasers qualify for overtime
    - Very possibly
  - What about Clerical?
    - Assistant HR
    - Executive Assistant
    - Payroll Clerk

# Check Your State Laws

- It all depends on the facts of their actual job
  - Job title is irrelevant
- If they are misclassified, you owe them OT after 40
  - And after 10 daily in some states



# And Worry About the Meal Periods

- Know your state laws on meal and rest breaks
  - <https://www.dol.gov/whd/state/meal.htm>
  - <https://www.dol.gov/whd/state/rest.htm>
- Highlights: California, New York, Washington, Oregon, Nevada, Massachusetts, Illinois

# Our Workforce: Two Ends of a Spectrum

# Consequences of an Aging Workforce

- More days lost to FMLA/serious health conditions
- Higher health insurance claims
- More requests for medical reasonable accommodations

# Common Serious Health Conditions

- Diabetes
- High Blood Pressure
- Glaucoma
- Cancer (obviously)
- Pregnancy (obviously)
- Heart disease
- Asthma
- Stuff with kids or parents

# Mental Health Conditions

- EEOC released new materials in December
- You cannot fire someone because of their mental health conditions
  - You don't have to employ them if they can't do the job...but
  - An employer cannot rely on myths or stereotypes about a mental health condition
  - In most situations, employees can keep their condition private

# Addressing Mental Health

- Take reports of mental health issues seriously
  - Often shows up first in rambling emails
- You never have a duty to accommodate threats or violence
- But conditions like Anxiety, Depression and Migraines can be disabilities



# Remember the Interactive Process

- If they have a disability and request an accommodation, you have an obligation to engage in the interactive process
- No record of the process = unlawful termination
  - And back pay
- Always note why a requested accommodation is unreasonable

# Know When to Ask for a Fitness for Duty Exam

- If EE is returning from medical leave for their own serious health condition
- If ER has a reasonable belief they can't do the essential functions of the job
- If ER is worried the EE poses a direct threat

# Always Exhaust the FMLA

- Proper FMLA & ADA compliance remains very important
- Always require EEs to use up their FMLA when they take time off for health conditions
- If EE hasn't exhausted their FMLA prior to termination for attendance, it could be unlawful
  - Means back pay

# More Prescription Drug Use

- Back pain and surgery bring pain killers
- Very specific steps for processing these requests
- Must be done technically correct or a subsequent termination could be unlawful
  - Means back pay

# Transitioning to Millennials

- Where do you already have Millennials?
  - Project Manager
  - Estimator
  - Purchasing
  - Superintendents?

# Traits of Millennials

- Less deferential to authority
- More individualistic, often creative
- Skilled with apps and social media
- Focus is on developing new skills and experiences
- Greatly value time off (work/life balance)

# Harness those Talents

- Your social media presence should be run by one of your Millennials
- Promote the company and highlight its projects
- A Millennial will welcome the responsibility
  - Be careful if they are hourly
  - Can't work "off the clock"



# Improve EE Engagement & Morale

- Use the company Facebook page as a very effective phone tree
  - e.g. “Office closed due to hurricane”
- Post job openings
  - Great for referrals
- Acknowledge birthdays and major events (wedding, kid graduates, etc.)
- Charity work
- Make the Office feel like a Community

# How to Make a Millennial Disgruntled

- Pigeon hole them in one job and never move them around
- Ignore their ideas or suggestions
- Tell them their salary is the only thing they are entitled to
- Ignore social issues
- No Paid Time Off

# More Thoughts on Workforce and Culture

- Engaged Employees are the most satisfied
  - Give them outlets for sharing their ideas and suggestions
- Move quickly to address legitimate issues
- Keep them informed about how the company is doing
- Consider profit-sharing

# Plan for Greater Drug Use

- About 20% of Millennials self-report to regularly smoking marijuana
- But use among over baby boomers has increased 71% since 2006
  - In green states, its even higher
- This will start to affect hiring and retention
  - Think about your priorities and then talk to your union and your employees
- And when you have to test the office employees...

# Succession Planning Suggestions

- Have Board of Directors well before any transition
- DO NOT split power evenly between all of the next generation
- DO pick one next gen to take over
- Worry about 3<sup>rd</sup> generation's leadership especially
- DO NOT ignore "absent family" interests

# A Public Service Announcement

# Cover the Camera on Your Laptop with Tape





THANK YOU! ANY QUESTIONS?

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