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2017: Labor & Employment
in For Major Transition

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 3rd 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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