2017: Labor & Employment in for Major Transition

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The Transition Defined

As a country, we swallowed the red pill.

“For this is your last chance ... After this, there is no turning back. You take the blue pill - the story ends, you wake up in your bed, and you believe whatever you want to believe. You take the red pill, ... you stay in Wonderland, and I show you how deep the rabbit-hole goes.” —Unattributed quote
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

President Trump promised to roll back regulations. He will have plenty to choose from.
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?
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 can surprise you with:
  - In Oregon, it is illegal for an employee in a manufacturing facility to work more than 13 hours per day.

See anyone you recognize?
How Are You Affected?

• Directly
  – EEs making minimum wage will get raises
  – Who else will get a bump?
  – Fewer applicants unless you increase wage rates to pay more than Starbucks

• Indirectly
  – What about your suppliers & distributors?
  – Can they afford the increases?
  – When they are affected, how are you affected?

Sure it’s $2 less per hour but its climate comfortable and the coffee is free.
Also Think About

- Hourly contribution rates (Pension/H&W)
- Unemployment Insurance Costs
- PTO 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.
- Approximately 20 cities have enacted paid sick leave ordinances.

A Long Term Labor Outlook

- Do more with less.
Long Term Projection is Hard

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

Like walking into fog.

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.

More money for the same work. What could possibly go wrong?
Things We Cannot Change: Retention is Our Biggest Operational Challenge

- Open industry secret: everyone is giving/considering wage increases right now.
- Have to. You can’t keep people.
- How many times last year did staffing shortages affect production?
- How many meetings have you had on retention?
- How much has changed?

Things You Cannot Change: Innovation is Accelerating

- Labor saving devices are nothing new but they are becoming more widespread and disruptive

- Machines can do the jobs of five employees
  – Seems ideal but what new problems does that create?
What Jobs are You Hiring for?

- Maintenance Technician? Electrical Helper?

- Or Machine Operator? Programmer?

- Those are fundamentally different jobs categories

- The skills required are different. And the value added is substantially more.

Targeted Hiring

- Where do you find most of your employees?
  - Word of mouth?
  - Temp Agencies?
  - Community

- What do you know about your employees?
  - Are a lot of them from the same town?
  - Immigrants?
  - Graduates of a certain high school?

- Once you know where your workforce comes from you can adjust where you recruit?
Your Workforce and Culture

- Approximately 30% of workers are dissatisfied with their jobs.

- 33% of U.S. employees in 2016 were engaged, 51% were not engaged and 16% were actively disengaged.

- How do you engage your workforce? Is it working?
  - Encourage employee innovation & ownership
  - Grant more control to employees

Strategic Conclusion

- Maybe we aren’t such a low wage work force anymore…

- Maybe we need to acknowledge that our industry is transitioning (rapidly) to a higher skilled, higher wage work force…

- And retention is still lousy…
If You Aren’t Transitioning…

• You are continuing to load up on low wage, low skilled labor.

• Which we already identified as the least economically efficient when minimum wages increase.

• And when your skilled EEs start jumping to your competitor…

Tactical Discussion: Retention

If someone is only doing something for money, retention will be lousy.
Why is Retention Lousy?

- Admittedly, there are many reasons.
  - Higher overtime, cold/hot working environment, physical demands of the job, etc.

- But one over looked reason has already been suggested

- Imagine you are working and you’ve already seen 8% of the jobs replaced by a machine.
  - What are you going to conclude from that?
  - Obviously, that your job isn’t long for this world.

Being Replaced by Robots

Source: CNN & Oxford University.
Career Path v. Replaced by a Machine

• So how long does an employee want to stay working a job that will be replaced by machine within 4 years

• To stay, they need to believe…
  – That they won’t be replaced when that machine is purchased
  – That instead of being down-sized, they’ll be operating that machine
  – And that they will be making more money for it

• That’s the difference between career path and job

Cross Training - #1 Recommendation

• The easiest way to both Do More with Less & Improve Retention
  – Helps you identify new leaders and promotions candidates
  – Most younger workers expect to be learning new skills, they don’t want to stagnate
  – Moves employees around so they form new relationships and friendships
    ▪ Stagnation is when the same five employees are doing the exact same jobs together in the same department for five years

• See also: risk of bullying

• Improves motivation and morale
Adds Robustness to the Overall Work Force

- How many irreplaceable employees do you have?
- Even one is too many. 
  - You should never have irreplaceable EEs
- If only one EE knows how to operate the machine, that’s bad management
- Always have redundancy. There has to be a “next man/woman up

Never too much of a good thing.

Reward with Wage Adjustments

- So how do you encourage cross training? 
  - Wage adjustments.
- Employees with multiple skill sets are more valuable. And they should be paid more.
- Tying direct wage adjustments to expanded job skills is the easiest way to do that. 
  - And then the highest performers get those jobs when they become available.

And start calling it a career path.
Consider Micro-Wage Increases

• Think about how you structure your wage increases

• No debate that wage increases improve worker morale and motivation
  – But research suggests that this effect is transitory (short-lived)

• Giving employees more frequent but smaller increases has a greater overall increase in productivity
  – Even when the total amount of the increase remains the same

And Don’t Forget Working Conditions

• Working conditions, not pay, continues to be the biggest complaint we hear from EEs

• Frequent complaints that cause Retention problems:
  – Bullying
  – A lot goes on back there that you never see
  – Pay attention to the Leads especially
  – And women on women bullying
  – Nepotism/Favoritism
    ▪ Especially in scheduling and promotions
Thoughts on Culture Matters

- Culture comes from the Bottom Up, not the Top Down

- Solicit EE feedback as often as you can
  - Especially about supervisors
  - Learning about problematic supervisors and taking action (additional training) will do more to improve retention than $1.50/hour wage increases
  - Management taking action on legitimate EE concerns is the single best way to improve morale and retention

If you aren’t getting good ideas from your people, you aren’t doing it right. And you probably aren’t doing more with less.

Best Practices Top 10

1. I will adopt Best Practices
2. I will adopt Best Practices
3. I will adopt Best Practices
4. I will adopt Best Practices
5. I will adopt Best Practices
6. I will adopt Best Practices
7. I will adopt Best Practices
8. I will adopt Best Practices
9. I will adopt Best Practices
10. I will adopt Best Practices
#10 – Use Arbitration Agreements with Class Action Waivers

- A lot of you in this room have already benefited from the waivers
  - If you got hit with a class action and were able to get out of it using these waivers

- If you don’t have them, be aware that the Supreme Court is taking a look at their validity in the Ernst & Young case.
  - If Neil Gorsuch is confirmed, it is likely they will be upheld.

#9 – More Use of 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
### #8 – Don’t Overload the Trucks

- **Hypothetical:**
  - One of your drivers comes to you with a ticket for an overloaded truck.
  - You ask: why did you have an overloaded truck?
  - The driver responds: I always have an overloaded truck.
  - You bring the Shipping Manager in and he confirms: you are consistently running overloaded trucks.
  - What do you do?

### #8 - Over Loaded Trucks

- Instruct them both in writing that company policy prohibits overloading trucks and that they will be terminated if it happens again.

- Overloading trucks is a form of negligent vehicle entrustment.

- If your over loaded truck is involved in an accident, punitive damages against the company will be very likely.
#7 – Don’t Trust the Staffing Companies

- Many are perfectly legitimate businesses and apologies to them for being smeared with others. But for the rest:

- Major Contract Issues:
  1. Indemnification
  2. Insurance
  3. Duty to Defend
  4. Qualifications, I-9s, Safety Training
  5. Mandatory arbitration

- Consider maintaining copies of time keeping and payroll records. Especially in state’s where you are a deemed joint employer.

#6 – 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
#5 - Curbing Bathroom Break Abuse

- The most common times employees need a bathroom break:
  - Right after a break
  - 10 minutes before the end of the shift

- EEs must have reasonable access to the bathroom.
  - Restrictions on access must be reasonable
  - ERs must accommodate any EE disabilities

- Sample Policy: Prohibit the taking of a bathroom break within 15 minutes of any official break or meal period and within 15 minutes of the start or end of the shift

“Boss, I’ll be right back.”

#4 - Hours of Service for Drivers

- May drive a maximum of 11 hours after 10 consecutive hours off duty

- May not drive beyond the 14th consecutive hour after coming on duty, following 10 consecutive hours off duty
  - Off-duty time does not extend the 14-hour period

- May not drive after 60/70 hours on duty in 7/8 consecutive days
  - A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty

- Also – beware states (like California) that require special rest period compensation for piece rate drivers (by the load or by the mile)

Especially a problem for drivers who you pay by the load or by the mile.
#3 - Electronic Logging Devices

- Must have an ELD by December 2017
- Prohibits harassment of drivers based on ELD data
- Does not apply to drivers that keep records of duty status in 8 or fewer of every 30 days
- Drivers must keep supporting documents for every 24-hour period that includes on-duty time

Hey, I can record my meal break on this.

#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 - Don’t Misclassify Sales Employees

- **Outside Sales**
  - Primary duty must be making sales; and
  - The employee must usually work away from the employer’s place or places of business.
    - Some state’s require more than 50% time
- **Inside Sales**
  - Work at the office
- **Independent Contractor**
  - Are they an LLC?
  - Do they set their own schedule?
  - Can they work for other companies?

He should have said “always be classifying”

Hiring for HR

Should be easy right?
One of the Most Important Hiring Decisions

• One of the most challenging hires
  – Need to build a culture that leads (not manages) your workplace
  – They enforce the workplace rules, investigate sensitive matters, and are responsible for avoiding costly lawsuits
  – Involved in most of the rest of your hiring
  – A bad hire will cost you money, expose you to lawsuits.
  – And they know where all the skeletons are buried which is really awkward if you have to fire them

What to Look for in an HR Representative

• Not a job hopper
• Hunger for knowledge
• Humility
• Team builder
• Likes to spend time on the plant floor
• Understands the importance of local management and employee relations
• Open to criticism and self-growth
What Else to Look For

- Leadership, not management
- Focus on talent development. Internal over external
- Comfortable with big data
- Strategic vision of labor solutions
  - Putting employees where they belong
  - Praise in public, criticize in private
- Generational Issues
  - Harnessing creative energy
  - Gives feedback and appreciation

HR Hiring Red Flags

- Backstabbing
- Gossip
- “I’m a multi-tasker”
- Prefers board meetings and the corporate office over the plant floor
- Solution to every problem: fire and hire from outside
- Lack of empathy
- HR should argue for the employee, not against
- Otherwise = class action lawsuit
March 28, 2017

For Reference of NECA Now 2017 San Antonio Attendees Only

Miscellaneous

NEW YORK POST

Trump executive order creates 2-for-1 rule on regulations

By Yaneos Krishnakumar

January 30, 2017 - YDN

Photo: AP

Mental Health

- EEOC released new materials in December
- You cannot fire someone because of their mental health conditions
  - An employer doesn’t have to hire or keep people in jobs they can’t perform, or employ people who pose a “direct threat” to safety (a significant risk of substantial harm to self or others).
  - An employer cannot rely on myths or stereotypes about your mental health condition
  - In most situations, employees can keep their condition private

Would You Tell Your Boss About a Mental Health Issue?

addiction.com
Addressing Mental Health

- Encourage your employees to feel comfortable expressing their needs. Be observant and talk with your employees.
- You never have a duty to accommodate threats or violence.
- In one case the Ninth Circuit said, “An essential function of almost every job is the ability to appropriately handle stress and interact with others. And while an employee can be qualified despite adverse reactions to stress, he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least five times).”

A Public Service Announcement

Hi Mark.
Nice photo.

Eh? Is that something on your laptop?
Cover the Camera on Your Laptop with Tape

Targets for Rule Changes (Not Including Immigration)

- Scrap the joint employer rule
- Incentive programs do not affect overtime premiums
- Permit incentives for safe workplaces
- Loosening the duties test for white collar exemptions
- Relief for federal contractors
- Uphold use of arbitration & class action waiver
Questions

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Up Next: Interactive Break in the Cibolo Canyon Ballroom
– TravelFit
– Workout Challenge
– Tips & Tricks for Taming Your Inbox
– 5 Ways to Keep Hackers Away From Your Personal Info

Don’t forget to fill out the online evaluation at www.necanet.org/NNSurvey2017