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.


- 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, nowhere 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 Ernst & Young case.
  - If Neil Gorsuch is confirmed, it is likely they will be upheld.
Using Employment Agreements

• The Basics:
  – Non-compete, 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/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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