

## The Complexities of Employment

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## Step One: Hiring Employees

- Federal anti-discrimination laws
  - Title VII, ADEA, ADA, GINA, etc.
- Fair Credit Reporting Act (FCRA)
- Don't forget about state laws!
  - Some states protect against discrimination on account of sexual orientation, political affiliation and off-duty conduct
  - Drug testing laws
  - “Mini” FCRA's
  - Arrests and convictions
  - State E-Verify requirements
  - State-mandated background checks

## Step Two: Paying Employees

### FLSA Basics

- Congress enacted the Fair Labor Standards Act in 1938 to address general economic conditions prevailing during the Great Depression
- Four key components:
  - Minimum wage
  - Overtime for hours worked beyond 40 in a workweek
  - Recordkeeping requirements
  - “Oppressive child labor” prohibited
- California's Wage Theft Protection Act

## Step Two: Paying Employees

### Minimum Wage: Key Questions

- Do all employees receive at least the current minimum wage *for every hour worked*?
  - Do you have casual laborers and, if so, are they earning minimum wage?
  - Are employees being paid for time spent on starting or ending activities (booting up computer, changing clothes, clocking in/ out)
  - Are lunch periods for non-exempt workers fully undisturbed and 30 minutes or more?
  - Are commission-only employees earning at least minimum wage?

## Step Two: Paying Employees

### Overtime: Key Questions

- Are all hourly workers receiving at least time and one-half for all hours worked over 40 in a workweek?
- Are bonuses and commissions paid and, if so, are they being used to calculate the hourly overtime rate?
- Are actual hours worked – as opposed to scheduled hours – being recorded?
- What mechanisms are in place to ensure no “off the clock” work? Who is responsible?

## Step Two: Paying Employees

### FLSA Exemptions

- *Primary FLSA Exemptions:* Executive, Administrative, Professional, Computer Professional, Learned Professional, Creative Professional
- *Other FLSA Exemptions:* Outside Sales, Seasonal Amusement or Recreational Establishment, Agricultural, Motor Carrier Exceptions, Domestic Workers, Police, Firefighter, and Public Safety, Communication, Commissioned Sales

## Step Two: Paying Employees

### Exemption Requirements

- Under federal law, employee must meet 2 requirements:
  - 1) salary basis test - the salary basis test is not applicable to outside sales and certain computer professionals.

AND

  - 2) Have duties that are categorized as executive, administrative, professional, computer or outside sales under the FLSA

(Note: Most states generally track FLSA.)

## Step Two: Paying Employees

### Misclassifying employees as independent contractors

- Employment status is defined by law, not by the parties' agreement
- Most significant factor is whether the putative employer has control or the right to control the worker, both as to the work done and the manner in which it is performed
- Case-by-case analysis
- “Factors” to determine status issued by IRS and EEOC
- Be mindful of IRS penalties and criminal consequences for misclassification.



## Step Two: Paying Employees

### Recordkeeping: Key Questions

- Are non-exempt time entries and other payroll records being kept for at least 3 years?
- Does your state require retention of records for longer than 3 years and, if so, have you timely retained all pay records under state law?
- Are your rounding practices lawful?
- Are all required posters up and current?
- Do your records contain all information required by state and federal law?
- Who has authority to adjust time entries and how is it monitored?

## Step Two: Paying Employees

### Common Errors to Avoid

- Assuming that paying a salary makes an employee “exempt”
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Directing staff to “get the job done” but ignoring the time it takes to complete the task
- Failure to pay for pre or post shift work activities
- Thinking that the business is not covered by “Federal” law or ignoring state law
- Improperly applying an overtime exemption
- Failure to properly calculate an employee’s regular rate

## Step Two: Paying Employees

### Common Errors to Avoid (cont'd)

- Deducting 15 or 20 minute rest breaks from work hours
- The “clock rule syndrome” [Auto-deduct ½ hour for meal periods; rounding up to scheduled start but deduct one minute at end if employee clocked out early]
- Employee does work at home but the hours are not recorded, thus, not paid
- Treating an employee as an independent contractor
- Taking partial day deductions from salary – may cause it to appear hourly based
- Making improper deductions from hourly wages – such as register shortages, drive offs, damage, tools, uniforms, etc.

## Step Two: Paying Employees

### Best Practices

- Ensure accurate timesheets and pay registers
- Ensure no unauthorized off-the-clock work
- Ensure bonuses and commissions are not wrongly excluded from overtime
- Building “good faith” defense to FLSA claims
  - Sound policies
  - Reporting mechanism for alleged violations
  - Review and certification of payroll records
  - Safe Harbor Policy
  - Audit for compliance

## Step Three: Employee Leave and Reasonable Accommodations

### Can an Employer Require?

- Regular and predictable attendance?
- Regular work schedules?
- Physical presence in the workplace?
- Mandatory overtime?
- Employees to do jobs a specific way?
- Employees to work the way a supervisor instructed?
- Proof employees can work safely?

## Step Three: Employee Leave and Reasonable Accommodations

### Family and Medical Leave Act

- Unpaid leave for up to 12 work weeks in a 12-month period:
  - for the birth, adoption, or foster care of a child;
  - to care for a child, spouse, or parent with a serious health condition; or
  - for the employee’s own serious health condition that renders the employee unable to perform the functions of his or her job
  - due to any “qualifying exigency”
- 26 work weeks for an employee who is the spouse, parent, son, daughter or next of kin to care for an injured or ill service member

## Step Three: Employee Leave and Reasonable Accommodations

### Americans with Disabilities Act (ADA)

- Requires employers to *reasonably accommodate* an otherwise qualified individual with a disability
- Reasonable accommodation is defined as a
  - modification or adjustment to a job, the work environment, or the way things usually are done
  - that enables a qualified individual with a disability to enjoy an equal employment opportunity
- Interactive Process
- Undue Hardship

## Step Three: Employee Leave and Reasonable Accommodations

### ADA Amendments Act

- Enacted September 25, 2008
- Became effective January 1, 2009
- EEOC issued proposed regulations on September 23, 2009
- EEOC issued Final Regulations on March 25, 2011
- Final Regulations become effective 60 days from March 25, 2011 or **May 24, 2011**
- As a practical matter, ADAAA is already in effect



## Step Three: Employee Leave and Reasonable Accommodations

We anticipate that in light of the ADAAA, including the expanded “regarded as” definition of disability contained in the ADAAA, **there will be an increase in the number of EEOC charges and lawsuits filed.** In particular, we anticipate that more individuals with disabilities might file charges with the Commission. Moreover, we anticipate that plaintiffs’ lawyers, who previously might not have filed an ADA lawsuit because they believed that an employee would not be covered under the Supreme Court’s cramped reading of the term “disability,” will now be more inclined to file lawsuits in cases where the lawyers believe that discrimination on the basis of disability—broadly defined—has occurred. As a result, **we believe that there may be additional legal fees and litigation costs associated with bringing and defending these claims, but we have no basis on which to estimate what those costs might be.**

Preamble to EEOC Final Regulations, Fed. Register, Vol. 76, No. 58 at 16995

## Step Three: Employee Leave and Reasonable Accommodations

Prepare for more ADA charges and more complicated and costly litigation

– ADA Charge Statistics

- 17% increase in last year
- 30% increase over last two years
- 40% increase over last three years

## Step Four: Handling Terminations

- Document, document, document!
  - Employee performance evaluations
- Follow progressive discipline policies
- Be objective—decisions should be based on facts and not emotions
- Disparate impact analysis for RIFs
- Give proper WARN notices
- Ante up!
  - Review accrual of vacation time and other entitlements and review records for any potential wage and hour violations
  - ERISA, COBRA, etc.
- Obtain valid releases

## Be Mindful of the Labor Law Landscape!

Union membership in the U.S. is currently at a 70 year low.

- In 2010, the union membership rate was just under 12 percent, whereas in 1983, unions represented over 20 percent of the American workforce.
- In the private sector, unions represent under seven percent of the workforce.

Press Release, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS,  
Union Members--2010 (Jan. 21, 2011).

## Be Mindful of the Labor Landscape!

- Labor Law Changes Without Legislation -- What changed and what is about to change?
  - Presidential Executive Orders
  - The National Labor Relations Board
  - The Department of Labor
  - State initiatives
- Corporate Campaigns
- What You Should Be Doing Now

# Be Mindful of the Labor Landscape!

## Presidential Executive Orders Government Contractors – E.O. 13496

### **EMPLOYEE RIGHTS**

#### **UNDER THE NATIONAL LABOR RELATIONS ACT**

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

##### **Under the NLRA, you have the right to:**

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

##### **Under the NLRA, it is illegal for your employer to:**

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

##### **Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:**

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

## Be Mindful of the Labor Landscape!

### Presidential Executive Orders

- **“NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS”- E.O. 13495:** Service contractor must offer jobs to prior contractor’s employees to help preserve the union and union jobs
- **“ECONOMY IN GOVERNMENT CONTRACTING”- E.O. 13494:** Contractor cannot use government funds to pay cost incurred for labor consultants, union-free training or lawful communications concerning unions
- **PROJECT LABOR AGREEMENTS - E.O. 13502:** Federal agencies can require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement (PLA) with one or more labor organizations

## Be Mindful of the Labor Landscape!

- NLRB Initiative Impacting on Social Media Policies
  - The law today (protected concerted activity)
  - The NLRB initiative regarding protected concerted activity
  - What can you do now?
    - Review your company's electronic communication and other policies that might be impacted by the NLRB's initiative
    - Conduct management training on protected concerted activity



# Be Mindful of the Labor Landscape!

## National Labor Relations Board Activism

### Social Media

- NLRB's Acting General Counsel released two reports, one on August 18, 2011 and another on January 24, 2012 each summarizing cases involving employers' social media policies and their application in specific situations.
- These cases involve current or terminated employees.

# Examples of Cases Decided by the NLRB

- NLRB found that facebook post soliciting assistance from co-workers on the issue of job performance in order to prepare for a meeting with the boss was concerted activity. Next, the NLRB found the facebook posts were protected because they went to terms and conditions of employment. Finally, even though there was swearing or sarcasm in some of the posts the employee was still protected.
- NLRB also considered employer's blogging and internet policy. Prohibiting: posting pictures of themselves which depict the company; making disparaging remarks when discussing the company; and use of language or action that was inappropriate or offensive, rude or discourteous violated §8(a)(1) of the NLRA. (prohibits rule which "reasonably tend to chill employees' exercise of §7 rights.)

# Examples Of Policies The NLRB Has Found Violate § 7

- Prohibiting employees from using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidential information for any person or entity.
- Prohibiting any communication or post that constitutes embarrassment, harassment or defamation of the employer or its officers, directors and employees.
- Prohibiting statements that lack truth or might damage the reputation or good will of the employer, its officers, directors and employees.

# Examples Of Policies The NLRB Has Found Violate § 7

- Prohibiting employees from posting about company business on their personal accounts anything they wouldn't want their supervisor to see, anything that may jeopardize their job, disclosing sensitive or inappropriate information about the company, posting pictures about the company and its employees that could be construed as inappropriate.
- Precluding the disclosure of personal information regarding coworkers, clients or the company and using company logos without written authorization.

# Examples Of Policies The NLRB Has Found Do Not Violate § 7

- Employer's policy restricting employee's contact with the media was lawful under the policy. The Public Affairs office was responsible for all official external communications and employees were expected to maintain sensitive information confidentially to allow one person to speak on the employer's behalf

# Examples Of Policies The NLRB Has Found Do Not Violate § 7

In the same report, the Board found certain activities involving facebook or Twitter posts were not protected:

- Newspaper employee terminated following tweet about news headlines including homicides, several tweets with sexual content and criticism of an area television station but the tweets were not shared with co-workers. NLRB found this was not concerted activity.
- Employee terminated based on a facebook conversation with a relative complaining about not getting a raise and working without tips. He did not discuss the posting with his coworkers and none of them responded so not concerted activity.

## Be Mindful of the Labor Landscape!

- *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
  - NLRB ruled that the NLRA prohibits employment agreements which waive employees' right to file joint, class or collective claims
    - May effect any employment agreement by which employees waive their right to class or collective action
  - Likely does not prohibit waivers which merely limit such actions to either federal court or arbitration
  - Only agreements which waive the right to collective action completely, by waiving the right to collective action in all forms, are clearly prohibited by *D.R. Horton*

# Be Mindful of the Labor Landscape!

## NLRB Initiative on Bargaining Units

- The law today
- The NLRB rulemaking initiative
- What can you do now?
  - Conduct a bargaining unit analysis
    - Look at the functions employees perform
    - Consider, to the extent appropriate and feasible, expanding borderline individuals' duties to meet the definition of a supervisor
      - E.g., does the person exercise independent judgment while assigning or responsibly directing other employees.?



## Be Mindful of the Labor Landscape!

### NLRB Initiative Impacting on Social Media Policies

- The law today (protected concerted activity)
- The NLRB initiative regarding protected concerted activity
- What can you do now?
  - Review your company's electronic communication and other policies that might be impacted by the NLRB's initiative
  - Conduct management training on protected concerted activity

## Be Mindful of the Labor Landscape!

### Corporate Campaigns Remain a Threat!

- Publicity and online activity in which the union criticizes the company's treatment of employees, publicizes examples of harassment, and criticizes the company's role as a "corporate citizen."
- Legal proceedings before the National Labor Relations Board (NLRB), Occupational Safety and Health Commission, Equal Employment Opportunity Commission, Securities and Exchange Commission, trade regulation authorities, as well as employment discrimination and class action lawsuits in state and federal courts and shareholder derivative suits.
- Alliances with religious leaders, consumer groups, and government agencies with the common goal of targeting the company.
- Pressure on shareholders, corporate boards, investors, customers, creditors, and service providers/suppliers.
- Traditional labor union methods, including demonstrations, pickets, and boycotts.

## Be Mindful of the Labor Landscape!

### Key Questions

- Has your organization taken steps to be viewed as an “employer of choice”? What is your reputation internally and externally?
- Have you reviewed whether your current labor relations approach is best for your organization? How has your company changed in the past few years? What is your plan for the future?
- Do you have an integrated, comprehensive labor relations plan?
- Do you have upper management and key stakeholder buy-in for your employment program?

# Be Mindful of the Labor Landscape!

## Key Questions

- What steps have been taken to make your organization “issue-free”?  
Are you contemplating a review or internal task force?
- Have you implemented “pro-active” and “best response” policies and practices?
- What is your ADR/dispute resolution program?
- In today’s changed world, do you provide competitive wages and benefits?
- Are you certain that you have lawful labor, employment, wage-hour, benefits and other workplace policies?
- Are you certain that your policies are properly administered by all levels of management?