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2018 EMPLOYMENT LAW CONFERENCE
MISSION:POSSIBLE

**THE CHANGING FACE OF THE
TRADITIONAL WORKFORCE**
SESSION 10

Presented by:
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Cerritos • Fresno • Irvine • Marin • Pasadena • Pleasanton • Riverside • Sacramento • San Diego

AGENDA



- Introduction
- Workplace Trends
- Remote/Telecommuting Workforce
- Independent Contractor Relationships
- Multiple Employer Status
- Conclusion

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1



WHAT'S TRENDING?

- The workday is **longer**
- Average full-time workweek in the U.S. is now **47 hours**
- 50% of full-time employees say they work more than 40 hours per week

Hours	Percentage
60+	18%
50-59	21%
41-49	11%
40	42%
Less than 40	8%

Source : Gallup data from 2013-2014 Work and Education Polls

WHAT'S TRENDING?

- **Technology** is replacing traditional tasks
- Timeframes estimated by artificial intelligence experts when “high level machine intelligence” will accomplish tasks better than humans:

Year	Human Task Outperformed
2024	Language translation
2027	Truck driving
2031	Working in retail
2049	Writing a best-selling book
2053	Working as a surgeon

Source : Grace, Salvatier, Dafoe, Zhang, and Evans, “When Will AI Exceed Human Performance? , accessed March 7, 2018, at [arXiv:1705.08807](https://arxiv.org/abs/1705.08807).

WHAT'S TRENDING?

- **Communication** is changing
 - **80%** of people are currently using texting for business
 - **79%** of companies believe customers want text message support
 - **70%** of employees think their organization should use texting to communicate with employees
 - Working millennials under the age of 25 send about **110** texts every day, including about **30** text messages while at work every day

Sources : Int'l Consumer Mgmt Institute Poll; Instantly Poll; Vitello Communications Group Poll; accessed March 7, 2018, via www.onereach.com; Pew Research Center Poll, accessed March 7, 2018, at www.pewinternet.org

WHAT'S TRENDING?

- Turnaround and response times are decreasing
 - 50% of email replies are sent in less than 60 minutes
 - Average response times based on age

Age	Average Email Response Time
Under 20	13 minutes
20 – 35	16 minutes
35 – 50	24 minutes
Over 50	47 minutes

- After 48 hours, there is little chance of a response

Source : USC Viterbi School of Engineering study, accessed on March 7, 2018, at www.forbes.com

WHAT'S TRENDING?

- Impact of technology
 - 9-5 workday is becoming 24-7
 - Turnaround times are shorter
 - **39%** of workers: "Tech makes my job **more** demanding"
 - **29%** of workers: "Tech makes my job **less** demanding"
 - More remote work
 - More telecommuting

Source : Pew Internet Poll, accessed on March 7, 2018, at www.pewinternet.org

WHAT'S TRENDING?




- Workplace **flexibility** is in demand
 - **67%** of HR professionals think employees have a good work-life balance—only **55%** of employees do
 - **64%** of managers expect employees to be reachable outside of the office on personal time
- Gallup study on employee wellbeing:
 - More flexibility > More time off
 - Engagement > More time off
 - Flextime = strongest factor in overall wellbeing

Source: Gallup Business Journal, Dec 18, 2012



8

WHAT'S TRENDING?

- Increase in “**Alternative Work Arrangements**”
- The “**Gig Economy**”
 - Uber 
 - CrowdFlower 
 - TaskRabbit 
- Temp agencies
- Contract workers
- Independent contractors
- Freelancers

Year	Percentage of Workforce
1995	9.3%
2010	10.1%
2015	15.8%

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015



9

WHAT'S TRENDING?

- Of that 15.8 percent:
 - 8.4% = Independent contractors
 - 3.1% = Contract workers
 - 2.6% = Freelance or on-call workers
 - 1.6% = Temporary staffing agency workers
- Typical age of gig workers:
 - More than 50% are **under 30**
 - One in three are **over 50**

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015



10

WHAT'S TRENDING?

- Driving forces of the “gig economy”:
 - Demand for flexibility
 - Technological change
 - Unemployment
 - Great Recession of 2008
 - Political push to limit offshoring of labor costs

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015



11

WHAT'S TRENDING?

- Heaviest “gig economy” user industries:

- Healthcare
- Education
- Construction
- Professional and business services
- Computer and mathematical services
- Social services
- Personal care
- Legal services

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015



12

WHAT'S TRENDING?

- Highest earning “gigs” include:

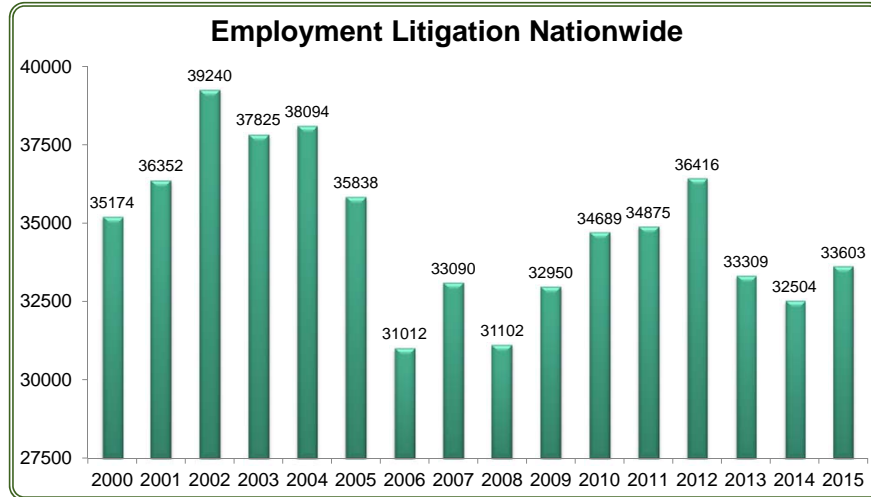
- Deep learning jobs, \$115.06/hr
- Blockchain jobs (powering cryptocurrencies), \$87.05/hr
- Robotics jobs, \$77.46/hr
- Penetration testing (“ethical hackers”), \$66.44/hr
- Virtual reality development, \$50.18/hr
- Video editing, \$37.12/hr
- Instagram marketing, \$31.23/hr

Source: www.entrepreneur.com, accessed on March 7, 2018.



13

WHAT'S TRENDING?

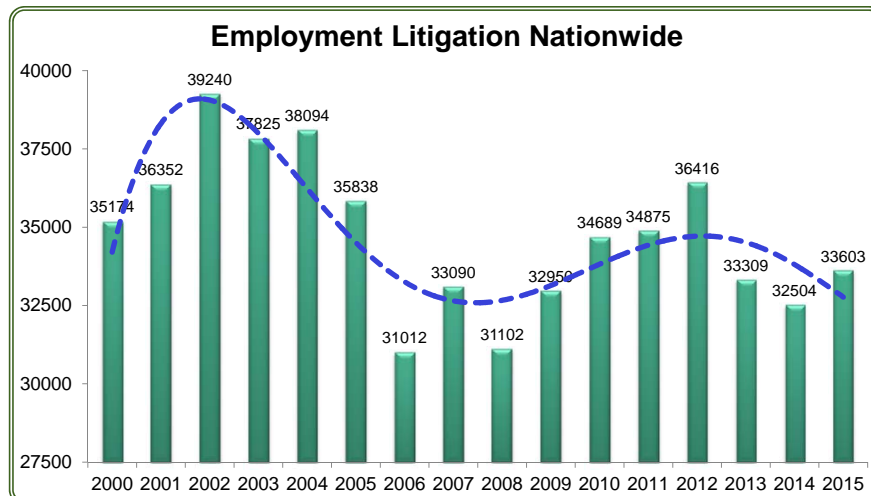


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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14

WHAT'S TRENDING?

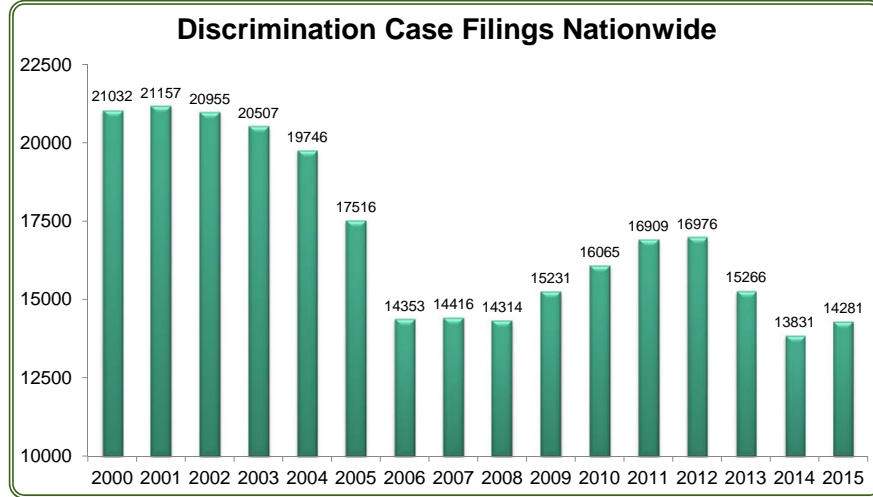


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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15

WHAT'S TRENDING?

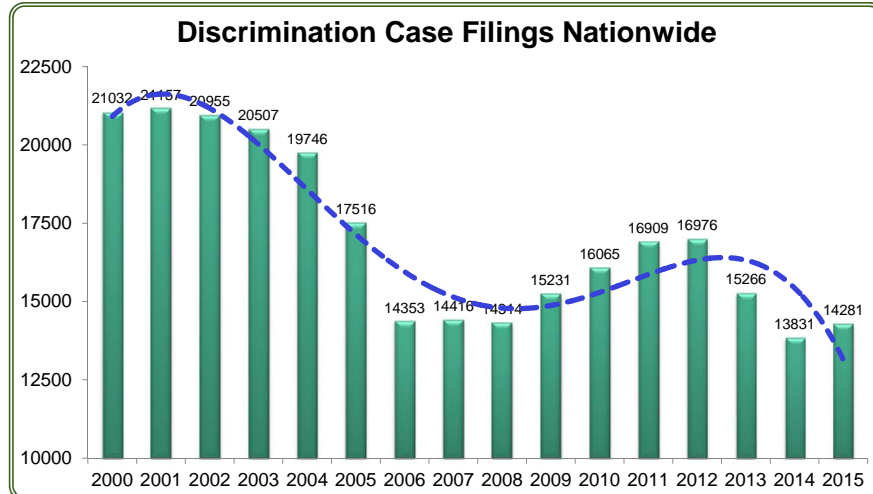


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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16

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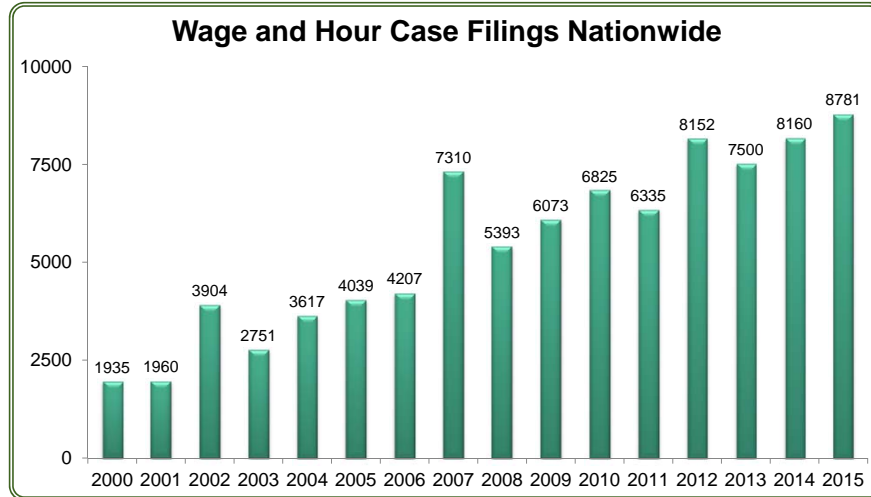


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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17

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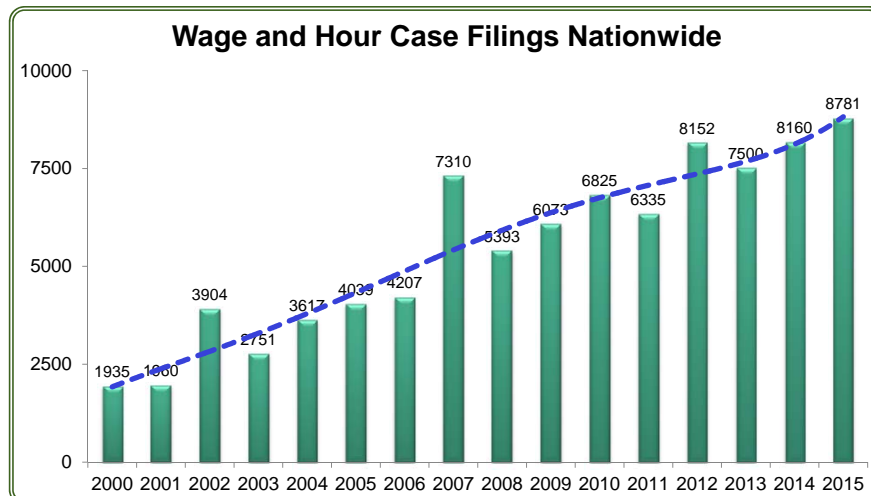


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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18

WHAT'S TRENDING?



Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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19

WHAT'S TRENDING?

- DOL Wage and Hour Division budget:

Year	Appropriations to WHD
2007	\$170,220,000
2009	\$193,092,000
2011	\$227,491,000
2013	\$215,184,000
2015	\$227,500,000
Requested for 2017	\$276,599,000

- **33.6%** increase since 2007

Source : FY2017 Congressional Budget Justification; U.S. DOL Wage and Hour Division

WHAT'S TRENDING?

- DOL Timesheet App:
 - Employees track hours and “determine wages owed”
 - Employees can forward time records directly to WHD



WHAT'S TRENDING?

- “Workers Owed Wages” website:
 - “[W]orkers can look up in Spanish or English whether they are owed back wages
 - Recouped over \$1,000,000 in back wages since 2015



REMOTE | TELECOMMUTING

- Telecommuting trends
 - 50% of workers hold a job compatible with telework
 - 20-25% of workers telework with some frequency
 - 80-90% would like to telework at least part time
 - 40% more employers offer more telework vs. 5 yrs ago
 - 3.7 million workers (2.8%) work from home at least 50%

Source : Global Workplace Analytics, <http://globalworkplaceanalytics.com/telecommuting-statistics>, accessed March 7, 2018.

REMOTE | TELECOMMUTING

- Typical teleworker
 - College educated
 - 45 years old or older
 - Earns annual salary of \$58,000
 - Works for company with more than 100 employees
- 75% of teleworkers earn over \$65,000 per year
 - 80th percentile of all employees

Source : Global Workplace Analytics, <http://globalworkplaceanalytics.com/telecommuting-statistics>, accessed March 7, 2018.

REMOTE | TELECOMMUTING

- Key legal concerns
 - Wage and hour issues
 - Off-the-clock work; expense reimbursement
 - Protecting confidential information
 - Network access restrictions; encryption; locked filing cabinets
 - Privacy issues
 - Monitoring; business vs. personal use and time
 - Employer liability and workers' compensation
 - Distinguishing business from personal space, time; ergonomics
 - Discrimination
 - Who gets to telecommute?



26



27

INDEPENDENT CONTRACTING

- The *Borello* test
 - What rights of control?
 - Discharge at will?
 - Level of skill?
 - Who supplies tools?
 - Contractor's investment?
 - Method of payment?
 - Opportunity for profit/loss?
 - Employ helpers?
 - Distinct business?
 - Level of supervision?
 - Tenure of relationship?
 - Regular part of or integral to principal's business?
 - Parties' belief?

INDEPENDENT CONTRACTING

- Safeguards against misclassification
 - Engage contractors with independent businesses
 - Engage contractors with own facility, equipment, etc.
 - Ensure a written contract is in place
 - Pay by assignment, not by time
 - Project timelines, not daily control over hours of work
 - Contractual remedies for delays, defective work, etc.
 - Give discretion to run business independently



MULTIPLE EMPLOYER STATUS

- California Labor Code 2810.3 already dictates joint employer status for:
 - Wages
 - Workers Compensation



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31

MULTIPLE EMPLOYER STATUS

- Forms of multiple employer status
 - Single employer test
 - *Alter ego* test
 - Joint employer test



MULTIPLE EMPLOYER STATUS

- Single employer test
 - Interrelation of operations (“functional integration”)
 - Common management
 - Centralized control of labor relations
 - Common ownership

MULTIPLE EMPLOYER STATUS

- Single employer factors
 - Financial dependence
 - Operational dependence
 - “Straight-line operation”
 - Nature and degree of business dealings
 - Degree of employee interchange
 - Control over labor relations

MULTIPLE EMPLOYER STATUS

- *Alter ego* test
 - Disguised continuance
 - “Sham transactions”
 - Utilizes single employer test

MULTIPLE EMPLOYER STATUS

- Joint employer test
 - Assumes companies are independent legal entities
 - Do two entities codetermine matters governing essential terms and conditions of employment?
 - Focus is on amount of control exercised by one employer over the labor relations and employment policies of the other
 - Right to control vs. actual exercise of control?

MULTIPLE EMPLOYER STATUS

- Joint employer factors
 - Day-to-day supervision of employees
 - Hiring and firing
 - Administration of discipline
 - Pay administration
 - Establishment of terms and conditions of employment
 - Direction of work assignments

MULTIPLE EMPLOYER STATUS

- Consequences of single, *alter ego*, or joint employer finding
 - Wage-and-hour liability
 - Workers' compensation liability
 - Employment tax liability
 - Employment discrimination
 - Dues, pension, health and welfare contribution liability
 - Failure to bargain with union
 - Failure to furnish information to union
 - Exposure to work stoppages


MULTIPLE EMPLOYER STATUS

- Safeguarding against single or joint employer status
 - Separate financial responsibility
 - Separate corporate records, accounts, lines of credit
 - Arms'-length written contracts
 - Separate insurance
 - Separate officers, directors, managers and supervisors
 - Minimize control over direction of labor
 - Different physical locations
 - Different employees; avoid interchange of employees

MULTIPLE EMPLOYER STATUS

- Safeguarding against single or joint employer status
 - Different equipment; any shared equipment handled through arms'-length dealing
 - Separate employment application processes
 - Independent creation, enforcement of personnel rules
 - Different employment policies, work rules, and handbooks for personnel matters
 - Separate wages, hours, terms and conditions of work
 - Operation in different marketplaces;
 - Service of different customers; use of different vendors





THANK YOU
For questions or comments,
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