The Changing Face of the Traditional Workforce
Session 10

Presented by:
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AGENDA

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

<table>
<thead>
<tr>
<th>Hours</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>60+</td>
<td>18%</td>
</tr>
<tr>
<td>50-59</td>
<td>21%</td>
</tr>
<tr>
<td>41-49</td>
<td>11%</td>
</tr>
<tr>
<td>40</td>
<td>42%</td>
</tr>
<tr>
<td>Less than 40</td>
<td>8%</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Human Task Outperformed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2024</td>
<td>Language translation</td>
</tr>
<tr>
<td>2027</td>
<td>Truck driving</td>
</tr>
<tr>
<td>2031</td>
<td>Working in retail</td>
</tr>
<tr>
<td>2049</td>
<td>Writing a best-selling book</td>
</tr>
<tr>
<td>2053</td>
<td>Working as a surgeon</td>
</tr>
</tbody>
</table>


WHAT’S TRENDING?

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

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

<table>
<thead>
<tr>
<th>Age</th>
<th>Average Email Response Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 20</td>
<td>13 minutes</td>
</tr>
<tr>
<td>20 – 35</td>
<td>16 minutes</td>
</tr>
<tr>
<td>35 – 50</td>
<td>24 minutes</td>
</tr>
<tr>
<td>Over 50</td>
<td>47 minutes</td>
</tr>
</tbody>
</table>
  • 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

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

WHAT’S TRENDING?

• Increase in “Alternative Work Arrangements”
• The “Gig Economy”
  - Uber
  - CrowdFlower
  - TaskRabbit

• Temp agencies
• Contract workers
• Independent contractors
• Freelancers

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of Workforce</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>9.3%</td>
</tr>
<tr>
<td>2010</td>
<td>10.1%</td>
</tr>
<tr>
<td>2015</td>
<td>15.8%</td>
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</tbody>
</table>

WHAT’S TRENDING?

• Of that 15.8 percent:
  o 8.4% = Independent contractors
  o 3.1% = Contract workers
  o 2.6% = Freelance or on-call workers
  o 1.6% = Temporary staffing agency workers

• Typical age of gig workers:
  o More than 50% are under 30
  o One in three are over 50


WHAT’S TRENDING?

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

WHAT’S TRENDING?

• Heaviest “gig economy” user industries:
  o Healthcare
  o Education
  o Construction
  o Professional and business services
  o Computer and mathematical services
  o Social services
  o Personal care
  o Legal services


WHAT’S TRENDING?

• Highest earning “gigs” include:
  o Deep learning jobs, $115.06/hr
  o Blockchain jobs (powering cryptocurrencies), $87.05/hr
  o Robotics jobs, $77.46/hr
  o Penetration testing (“ethical hackers”), $66.44/hr
  o Virtual reality development, $50.18/hr
  o Video editing, $37.12/hr
  o Instagram marketing, $31.23/hr

WHAT’S TRENDING?

Employment Litigation Nationwide

Source: Civil Cases Filed, by Nature of Suit report from www.uscourts.gov
WHAT’S TRENDING?

Wage and Hour Case Filings Nationwide

Source: Civil Cases Filed, by Nature of Suit report from www.uscourts.gov
WHAT’S TRENDING?

• DOL Wage and Hour Division budget:

<table>
<thead>
<tr>
<th>Year</th>
<th>Appropriations to WHD</th>
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</thead>
<tbody>
<tr>
<td>2007</td>
<td>$170,220,000</td>
</tr>
<tr>
<td>2009</td>
<td>$193,092,000</td>
</tr>
<tr>
<td>2011</td>
<td>$227,491,000</td>
</tr>
<tr>
<td>2013</td>
<td>$215,184,000</td>
</tr>
<tr>
<td>2015</td>
<td>$227,500,000</td>
</tr>
<tr>
<td>Requested for 2017</td>
<td>$276,599,000</td>
</tr>
</tbody>
</table>

• 33.6% increase since 2007

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

WHAT’S TRENDING?

• DOL Timesheet App:
  o Employees track hours and “determine wages owed”
  o Employees can forward time records directly to WHD
WHAT’S TRENDING?

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

REMOTE WORK AND TELECOMMUTING
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%


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

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?

INDEPENDENT CONTRACTING
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 RELATIONSHIPS

MULTIPLE EMPLOYER STATUS

• California Labor Code 2810.3 already dictates joint employer status for:
  o Wages
  o Workers Compensation
MULTIPLE EMPLOYER STATUS

• Forms of multiple employer status
  o Single employer test
  o Alter ego test
  o Joint employer test

MULTIPLE EMPLOYER STATUS

• Single employer test
  o Interrelation of operations ("functional integration")
  o Common management
  o Centralized control of labor relations
  o 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

- *Alter ego* test
  - Disguised continuance
  - "Sham transactions"
  - Utilizes single employer test
MULTIPLE EMPLOYER STATUS

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

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

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

MULTIPLE EMPLOYER STATUS

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

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

CONCLUSION
Thank you
For questions or comments, please contact:

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