

Impact of Regulatory Changes on Your Human Capital

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Topics to Cover

- National Labor Relations Act
 - Quickie elections
 - Micro Unions
- DOL
 - Fair Labor Standards Act Exemption change proposed
 - Independent Contractor change
- Same Sex Marriage



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NLRA

Quickie Elections

- Took effect 4/14/15
- NLRB winning 70% of the elections they are positioning for
- Did not change expectations/timing on decertifying a union

Rule Change

- Changes time frame on each phase of process
- Pre election hearings – previously no time frame, now 8 days
- Denies right to a hearing on voter eligibility until AFTER election
- Employers must provide email addresses of eligible employees within 2 days of direction of election
- Election time frame previously 25-30 days, now can happen in as little as 13 from direction of election
- Board Review of post election disputes is discretionary rather than mandatory

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NLRA

Other fun stuff

- Micro unions
 - Cross training is a good way to reduce risk
- Investigations and Confidentiality
 - Can't tell an employee they are not permitted to share information
 - Salary included

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NLRA

Overbroad

- NLRB issued a memorandum in March 2015 that outlined how employment policies may compromise an employee's ability to be protected by the NLRA.

This applies to all companies.

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NLRA

Memo addresses many items including:

- Salary
- Confidentiality
- Communicating with media and outside vendors
- Social Media, using logos and trademarks
- Restrictions on employees leaving work
- Negative comments about company, supervisors and peers

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NLRA

- NLRB believes it isn't the action as much as what is behind the action
- Policies need to make sure they are not so blanket/generic that they cover everything
- Give examples to ensure clarity
 - Ex: disparaging comments
 - Ethnic or racial slurs, bullying or intimidating language
- Can't violate or restrict Section 7 (Protected Concerted Activity)
- Social Media policies are big offenders

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NLRA

Prevention methods

- Review your handbook
 - Policies that have termination associated with them
 - Overbroad statements or language
 - Social Media Policy
- Train supervisors/managers
- Create the right environment
 - Performance feedback
 - Salary benchmarking
 - Cross training

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Changes to Fair Labor Standards Act

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DOL Exemption Status Rule Change

Fair Labor Standards Act

- Exempt vs. Non Exempt
 - Whether someone qualifies to be paid overtime
 - OT is paid after 40 hours in work week
 - OT is paid at 1.5x hourly rate
- Hourly vs. Salaried
 - Manner in which you calculate pay
 - Does not indicate eligibility for OT

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DOL Exemption rule

Proposed Exemption Status change

- Currently \$23,660
- Proposed \$50,440

What does this mean?

- Any employee paid less than this amount will be eligible for OT at 1.5x hourly rate
- Every hour worked over 40 in a work week

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DOL Exemption Rule

Effective Date of change

- At this point this is just proposed
- DOL is taking opinions on the issue currently
- Expected to be implemented mid 2016

Potential consequences

- Morale issues of employees
- Increase in costs
- Inability to effectively track time to pay accordingly
- Decrease in flexibility/flexible work arrangements

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FLSA

What if I don't change in 2016?

- \$50,442 is not a final number
- DOL calculated this off of 40 percentile of weekly earnings for FT workers in the US
- May need to consider salaries annually – DOL proposition to adjust on an annual basis
- DOL considering non discretionary bonuses to be included in calculation
- Plaintiff lawyers are already questioning exemption status of positions like HR Directors and Attorneys

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FLSA

- DOL has requested a budget that will allow them to add an ADDITIONAL 305 FTE to continue the effective enforcement program, 35 specifically to investigate misclassification, 21 to increase enforcement of FLSA (appropriate wages) and FMLA
- Employers (Owners and Managers/Supervisors) can have personal liability in FLSA violations and suffer significant fines

(Source: 2015 DOL budget: <http://www.dol.gov/dol/budget/2015/PDF/FY2015BIB.pdf>)

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FLSA Violations

- Since 2009, DOL has concluded investigations resulting in more than 1.3 billion dollars in back wages for more than 1.5 million workers
- Generally speaking, workers are eligible for back wages and an equal amount of pay in liquidated damages

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FLSA Violations

- 166 workers at a Philadelphia Direct Mail and Printing company
- DOL conducted investigation uncovered OT being paid at straight time or less
- \$725,583 in OT wages and an equal amount in liquidated damages
- \$1.4 M in total for judgment for OT violations
- July 2015

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FLSA Violations

- NY based apparel and accessories manufacturer and distributor
- Denied 49 workers OT and then threatened them if they spoke to DOL
- Did not pay OT at 1.5x rate, had some workers not on payroll
- \$121,349 in OT back wages and liquidated damages
- \$13,744.50 in civil judgment due to willful nature
- April 2015

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FLSA Recommendations

What to do?

- Make sure you have a clearly defined work week
- Make sure you have timekeeping mechanism that all employees can use
- Make sure you have policies that support company position and require work from home to be tracked
 - Reimbursement of cell phones or internet connection
 - Answering email at night
 - Work from Home/Flextime
- Identify which employees are at risk, redefine annual pay and exemption status, offer OT if applicable – PUT IT IN WRITING

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FLSA meet NLRB

Contractor?

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Contractor?

Independent Contractor Classification

- DOL has narrowed independent contractor classification rules – July 15, 2015
- DOL position is that most contractors are actually employees under FLSA and are entitled to its benefits
- Change is around extent to which an employer controls the work and level of economic dependence (dependent on employer or truly in business for him/herself)

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Contractor?

Economic Realities Test

1. Extent to which work performed in an integral part of employer's business
2. Worker's opportunity for profit/loss
3. Extent of the investments of employer and the worker
4. Does work require a special skill and initiative
5. Permanency of relationship
6. Degree of control exercised or retained by employer

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Contractor?

NLRB

- Browning Ferris Industries of California decision
 - 8/27/15
 - New joint employer standard
 - Determined that employees of staffing company were considered to be employees
 - Staffing company had a site manager and 3 supervisors overseeing staff
 - While the agency was determined to be sole employer, the Union requested the NLRB to review and joint employer status was determined for purposes of the Union's representation petition

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Contractor?

- Impact
 - Non Unionized temp staffing employees could be your employees
 - Further concern when considering quickie elections
 - Multiple defendants in law suits
 - Wage and Hour
 - Unemployment
 - Harassment/Discrimination

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Contractor?

How to control – not all 1099's are equal

- Work with established Independent Service Providers
- Evaluate contracts and scope of work
- Use contractors sparingly
- Don't give internal email accounts, or invite to employee functions
- Expenses should be limited to scope and not reimbursed through AP or payroll unless accompanied by an invoice and supported with a contract
- Keep a positive relationship with employees and contingent workers

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THANK YOU

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Same Sex Marriage

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Same Sex Marriage

June 26, 2015

Obergefell v. Baker

- Federal ruling requiring all states to issue marriage licenses to same sex couples
- Recognize same sex marriages regardless of where license is issued
- Prior to Obergefell, 34 states recognized

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Same Sex Marriage

Pennsylvania

- No same sex marriage law at state level
- Prohibits discrimination against public employees based on sexual orientation and gender identity
- Surrounded by states that have sexual orientation and gender identity discrimination laws (NJ, NY, MD, DE, New England)

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Same Sex Marriage

What does this mean to me?

- All states essentially recognize same sex marriage now
- Could impact some of your employees
 - Religious beliefs
 - Who is their spouse?
 - Create environment of discrimination
- Consider implication on benefit plans
 - Do you have Domestic Partner Benefits covered? Does this change?
 - How do you handle Common Law Marriage currently? Does this change?
 - Complicated issue relative to whether you HAVE to offer benefits to same sex spouses

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Same Sex Marriage

- Affected Benefits
 - FMLA
 - Medical
 - FSA/Dependent Care
 - Pre Tax implications
 - Limit amounts
 - COBRA
 - HIPAA
- Anticipated that even state level courts will support employee in discrimination related to providing coverage

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Same Sex Marriage

Take Aways

- Review and update policies to make sure you are compliant with same sex marriage and anti-discrimination laws
- Consider benefits eligibility and plan design
- Make sure you or your supervisors/managers are not unintentionally discriminating - TRAIN
- Talk to your broker and tax attorney/accountant

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