

Labor and Employment 2022 Symposium

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Back to Basics 2022, Part 2 – HR Best Practices in a Cooling Economy

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Materials

PowerPoint Presentation

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.



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Performance Management: The Coming Wave

- **There is a wave of employment litigation coming!**



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Performance Management: The Coming Wave

- **The Pandemic Hits!**
 - It's global, it's unprecedented, it disrupts everything.
- **Everyone goes remote.**
 - Companies triage rapid-fire crises.
 - Essential businesses, lockdowns, stockpiling resources, outbreaks in their workforces.
- **Performance management processes cease.**
 - Mass remote work disrupts performance management.
 - Serial crises get in the way of implementing new performance management systems.

Performance Management: The Coming Wave

- The government *actually starts paying companies to not fire anyone!*
 - PPP loans gave employers an economic incentive to retain workers. Even poor performing ones.
- COVID-19 tightens labor markets.
 - Workers experience an existential crisis—
The Great Resignation.
 - The economy reopens flush with cash from the government, but workers aren't interested in rushing back.
 - Aid allows more workers to stay on the sidelines or retire early
 - This leads to an incredibly tight labor market.

Performance Management: The Coming Wave

- Employers become desperate for headcount and a *lot* less picky.
 - Lower hiring standards and more willing to tolerate poor performance
- This all leads to poor performance management
 - Artificial “meets expectations” ratings
 - Or no ratings at all
 - No documentation or warnings because employers cannot afford to have people quit
 - Sets a new low bar for consistently poor performing employees
- A hot labor market means employees are far less likely to sue
 - They can just go across the street for a new job
- What happens when the hot labor market cools?
 - They always do eventually

Performance Management: Prepare Now!

- **Documentation, Documentation, Documentation!**
- **Guidelines**
 - Documentation should be clear enough for a neutral third party to understand what happened (you may win lotto next weekend and be retired and traveling abroad when issues arise).
 - Who, What, When, Where, Why, Witnesses – **DETAIL!**
- **Performance plan should state**
 - The rule and violation
 - The expectation
 - Timetable for meeting the expectation
 - Consequences of not meeting the expectation in timetable
 - Timetable for follow up

Performance Management: Prepare Now!

- **No more grade inflation**
 - A low “meets expectations” means “not bad enough to be fired.”
 - Explain this to managers so they understand the consequences of their evaluations.
- **Make performance management a regular thing.**
 - No one should be surprised by their review.
 - Study after study shows that no feedback is even worse than harsh feedback when it comes to employee engagement.
- **Have a plan for dealing with mis-graded consistent poor performers.**
 - Explain that the bar is being reset.
 - Give the employee a runway to meet that bar.
 - Give the employee regular feedback and assistance in meeting that bar.
 - Focus on things within the employee’s control (e.g., number of sales calls per day).

Performance Management: Goldstein's Law

In all of your interactions with employees:

- **DON'T BE A JERK!**
- **At all times, avoid language that could be seen as “mean,” “uncaring,” or “unreasonable.”**
- **Your communications should demonstrate to a third party that your goal is to help the employee succeed.**
- **At-will employment is dead, practically speaking.**
 - Most employees are in at least one protected class or have recently engaged in some form of protected activity.
 - You *always* need a legitimate non-discriminatory/non-retaliatory basis for a termination.

Talent Acquisition and Retention: What Employees Want

- **Work Location and Schedules**
 - Many office workers want more flexibility
 - Many service and retail workers want more predictability
- **Employee Health and Wellbeing**
 - Employee mental health, the new normal with Covid, Monkeypox?
 - Employee caregivers
- **Compensation Adjustments**
 - Inflation undercutting wage increases
 - Pay equity concerns
- **All of the Above**
 - Unionization trend

Employee Scheduling Law

- **Predictive scheduling laws**
 - Berkeley, Chicago, Emeryville, New York City, Philadelphia, San Francisco, San Jose, and Seattle
 - May require:
 - Advance notice of work schedule
 - Written schedule estimate at time of hire
 - Predictability pay if not adequate notice
 - Right to rest – no “clopening”
 - Part-time employees get option of more hours
 - Documentation requirements

Employee Scheduling

- **Predictive scheduling law bans**
 - Alabama
 - Arizona
 - Arkansas
 - Georgia
 - Indiana
 - Iowa
 - Kansas
 - Michigan
 - Missouri
 - North Carolina
 - Ohio
 - Oregon
 - Tennessee
 - Wisconsin

Employee Health and Well Being

- **Mental Health Issues are Prevalent**
 - Many employees feel isolated
 - Creating employee connections
 - Protection of medical information
 - Employee health can impact performance
 - Disability accommodation requirements: still here and increasingly important
 - One size doesn't fit all
 - Listen, consider, and discuss what could help
 - The reasonableness of a requested accommodation may be different now
 - Assess performance *again after* accommodations given
 - Importance of a good process that employees know

Employee Health and Well Being

- **Is Pandemic Over: Prepare for What's Next**
 - COVID remains an issue
 - Employee concerns with relaxed prevention measures
 - Long COVID as a disability
 - Disrupted childcare
 - Prepare for Monkeypox
 - What worked well in your COVID policies and what didn't?
 - Plan ahead of time

Compensation: Salary Transparency Laws

- **Current Laws**
 - California; Colorado; Connecticut, Ithaca, NY; Maryland; Nevada; New York City (eff. Nov. 2022); Rhode Island (eff. 2023); Washington; and Westchester Country, NY
 - Rate of compensation
 - Available bonuses, commissions, etc.
 - Benefits
 - How does coverage apply to remote workers?
- **Are you ready to disclose position compensation?**
 - Are your pay bands current?
 - Are your positions appropriately placed in pay bands?
 - How will your current employees react to seeing the outside candidate range?
 - Will the compensation cause pay equity concerns?

Compensation: Applicant Salary History Bans

- Alabama
- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Nevada
- New Jersey
- New York
- Oregon
- Puerto Rico
- Rhode Island (eff. 2023)
- Vermont
- Washington
- Wisconsin

Compensation: Wage Disclosure Protections

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New York
- Oregon
- Puerto Rico
- Rhode Island (eff. 2023)
- Vermont
- Virginia
- Washington

Compensation: Pay Equity

- **EEOC Pay Data Collection Study**
 - Expanded EEO-1 data gathered 2017-2018, completed in 2020
 - National Academies of Sciences, Engineering, and Medicine Study
 - Concludes that there is value in the expanded EEO-1 data, which are unique among federal surveys
- **Payscale Study**
 - 52 percent of employers surveyed said they plan to conduct a gender- or race-based pay equity analysis in the next year
 - The first time the majority of survey respondents have said they will do so in the 13-year history of Payscale's annual survey

Compensation: Pay Equity

- **Pay Equity Study Steps and Best Practices**
 - Obtain leadership buy-in before beginning
 - Conduct under attorney-client privilege
 - Determine appropriate segmentation of positions
 - Are there groups that will have clear discrepancies?
 - Conduct statistical analysis
 - Determine adjustments to make, perhaps over time
 - Identify pay practices that may create structural pay disparities
 - Determine whether legitimate compensation philosophies and practices explain discrepancies
 - Evaluate position placement, as well as rate in position

Putting It All Together: Unionization Trend

- **Increase in Union Petitions and Elections**
 - Union representation petitions filed at the NLRB have increased 58%—up to 1,892 from 1,197 during the first three quarters of FY2021
- **Multiple Factors**
 - Employee COVID concerns
 - Public attention to working conditions
 - Unions as agents of social change
 - Demographics of work force

CLE Code for Attendees

(Tip: The CLE code is different than the event code assigned by states)

Terminations: Be Prepared

Three* Rules for Effective Terminations

(*Because we only have 15 minutes . . .)

- **Rule No. 1: Follow Aaron's advice!**
 - If you have thoroughly performance managed and maintained clear documentation supporting the reason for termination, you're starting ahead!

Terminations: Be Prepared

- **Rule No. 2: Play Devil's Advocate!**
 - Review the employee's protected class(es) and compare to others outside those classes.
 - Make sure you know about potential protected complaints.
 - Consider [reasonable] worst case scenarios: Do you have the evidence to prove legitimate reasons for termination? What are your gaps?
 - Would a "reasonable juror" believe that the employee received a fair shake?
 - If risk, consider a separation agreement.

Terminations: Be Prepared

- **Rule No. 3: Think about timing.**
 - Avoid tipping your hand.
 - Make a record of when the termination decision was made.
 - Be prepared to timely control access.
 - When should you have the termination meeting?
 - Be prepared for final pay and review other state and local requirements.

Think About Protecting Company Property

- Review your non-disclosure, IP and access/privacy policies.
- Review your non-disclosure, IP and restrictive covenant agreements.
- Control data access at the appropriate time.
- Provide crystal-clear instructions regarding access, return of property and/or destruction. Follow-up in writing.
- Monitor activity and look for red flags of misbehavior (but beware the metadata!).

Think About A Severance Plan

- Potential benefits:
 - Recruiting and retention benefits
 - Clarity in uncertain times
 - Limit individual separation negotiations
 - Opportunity to incorporate restrictive covenants, releases and other favorable terms
 - Potential ERISA protections

Think About A Severance Plan

- **Key decisions:**
 - Which employees covered?
 - What separations qualify?
 - What severance offered?

Running The Traps Of Group Terminations

- **Think about disparate impact early and often.**
- **Remember the OWBPA requirements for separation agreements for older employees.**
 - 45-day consideration period
 - Title and age disclosures by decisional unit

Running The Traps Of Group Terminations

- **Remember the WARN Act**
 - 60-day notice requirement
 - Covered employers: 100+ employees
 - Triggering events:
 - *Plant closing* – shut down of “single site of employment” resulting in “employment loss” for 50+ employees during a 30-day period
 - *Mass layoff* – reduction in force that is not a plant closing resulting in an “employment loss” during a 30-day period for 500+ employees OR 50-499 employees if at least 33% of employees affected

Running The Traps Of Group Terminations

- **Beware WARN landmines!**
 - 90-day aggregation rule
 - Part-time employees don't count, but get notice
 - Full-time temporary employees do count, but don't get notice
 - “Employment loss” doesn't include layoffs < 6 months, but does include a 50% reduction in hours
 - Notice must be *received* 60-days before employment loss or 60-days before anticipated date of recall
 - Notice must be provided to employees *plus* union representatives and governments

Running The Traps Of Group Terminations

- **Beware WARN landmines!**
 - Notice must include nature of employment loss, anticipated dates, whether or not job bumping rights exist and employer contact information
 - Extension of short-term layoff (6 months or less) may trigger WARN obligations.

Yes, there are some potential exceptions to the WARN Act. No, they probably don't apply to you.

Beware state WARN Acts, too.

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