



NEW WORKFORCE CHALLENGES

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Wage-and-Hour Suits Are on the Rise

- Many Wage-and-Hour Suits Being Brought by Employees and Department of Labor (DOL)
- DOL Enforcement:
 - DOL Brought ~25,000 Compliance Actions and Collected \$172 Million for 220,000 Workers in 2009
 - Employee Complaints to DOL Up in 2010
 - DOL “We Can Help” Campaign Aimed at Low-Wage and Immigrant Workers in Early 2010
 - DOL 2010 Misclassification Initiative: Independent Contractors
 - DOL has Requested 29% Increase in Enforcement Staffing for 2011
- Employee “Collective Actions”: Similar to Class Actions

- Costs to Employers of Either DOL or Employee Suits Can Be Significant:
 - Up to 3 Years of Overtime and Minimum Wage Back Pay to Employees (State Back Pay Periods Can be Longer)
 - Double Damages
 - Bar on Shipping “Hot Goods”
 - Cases Can be Extremely Expensive to Defend
 - Managers/Owners Can Be Held Personally Liable if They Knew About Violation
 - Commonly Not Covered by Employment Litigation Insurance

- Fair Labor Standards Act (FLSA) Issues Litigated Include:
 - “Donning and Doffing” Cases
 - Lunch – Minnesota Law Arguably Requires Full 30-Minute Lunch Break if Working 8 Hours
 - Exempt/Non-Exempt Cases
 - “Off the Clock” Cases
 - Other Pre- Post- Shift Activities Such As Showering or Going Through Security
 - On Call
 - Working at Home
 - Booting Computers

- Employers Can Reduce Their Exposure
 - Donning and Doffing
 - Check Policies on Gear Required
 - Move Gear Closer to Work Areas but on Production Side of Time Clocks
 - Move/Add Time Clocks
 - Train Supervisors
 - Check Rounding Rules and Practices
 - Evaluate CBAs/Practices as to Union Employees

- Lunch
 - Consider Having Employees Punch In and Out at Lunch
- Exempt/Non-Exempt
 - Review Independent Contractor Practices
- “Off the Clock”
 - Check Policies on Need for Showering
 - Use Time Clocks/Computerized Systems
 - Make Sure Supervisors Document Reasons for Changes in Time Records

- “Gotcha Litigation” But Ultimate Zero-Sum Game
 - Many Times Pay Practice Changes Can be Paid for by Added Efficiencies, *e.g.*, Supervisors May be Letting Employees Leave Work 15 to 20 Minutes Early to Clean Up
 - Going Forward, Costs May be Absorbed by Reduced Wage Increases
 - So Real Cost is “Gotcha” for Past Practices

Equal Pay Claims

- Two Recent Decisions Likely to Ignite Further Litigation
 - *Velez v. Novartis Pharmaceuticals Corp.* (May 2010)
 - Jury Awarded Female Employees \$3.37 Million in Compensatory Damages and \$250 Million in Punitive Damages for Discrimination Based On Pay, Promotion and Pregnancy
 - *Dukes v. Walmart* (May 2010)
 - The Ninth Circuit Affirmed Certification of a Class of 500,000 Women Based On Claims They Are Paid Less Than Men

Potential Changes in Equal Pay Laws

- Paycheck Fairness Act (Proposed Legislation) Would Amend the Equal Pay Act in the Following Ways:
 - Limit the Affirmative Defenses Currently Available to Employers
 - Enhance the Employee's Ability to Seek Un-capped Compensatory and Punitive Damages
 - Make it Easier to Pursue Class Actions
 - Expand Anti-retaliation Provisions
 - Give the Federal Government New Authority to Collect Compensation Data
- Fair Pay Act (Proposed Legislation) Would Amend the Equal Pay Act
 - Would Require Employers to Provide Equal Pay for Men and Women not Only in the Same Jobs, but Also "Comparable" Jobs

Religious Discrimination/Accommodation Suits

- The Equal Employment Opportunity Commission (EEOC) has Reported Significant Increase in Religious Discrimination Claims in Last Several Years
- EEOC has Made Such Claims More of a Priority
- Not All, But a Significant Percentage are Brought by Muslim Employees
- ~10,000 EEOC Charges by Muslim Employees Over Last 10 Years
- 803 Charges by Muslim Employees Last Year
- Minnesota Second Highest Number of Muslim Employee Claims - 64

- Muslim Workers from Somalia and Elsewhere are Concentrating in Minnesota and Certain Other Areas of the Country
- Muslim Employees also Tend to Concentrate in Low-skilled Jobs
- Swift (EEOC Suit), Tyson, Target, Macy's, Gold'n Plump, Electrolux Have all Experienced Multi-employee Claims by Muslim Employees
- Most Difficult Issues to Address/Most Likely to Result in Class Litigation
 - Harassment
 - Accommodation of Religious Practices

Law Requires That Employers Accommodate Religious Beliefs Unless it Would be an "Undue Hardship"

- Under a U.S. Supreme Court Decision, Anything More Than a *de minimus* Cost is Considered an "Undue Hardship"
- Hardship Assessed on "First-Come, First-Served" Basis
- EEOC is Ignoring the Supreme Court and Insisting Employers Accommodate all Employees' Beliefs Regardless of Cost

Accommodation of Muslim Line Employees Beliefs Can Be Particularly Difficult

- Muslim Employees Request Accommodation for Their 5 Daily Prayers, Friday Prayers, Women's Dress, Several Religious Holidays, Opportunity to Break Their Fast During Ramadan, Beliefs Related to Pork
- Prayer Accommodations Can Be Very Challenging
 - 5 Prayers a Day
 - Washing is Part of the Ritual – Including Feet
 - Wide Variation in Prayer Times – Especially in Northern Latitudes

Prayer Times June 20 Compared to December 20

	June 20, 2010	December 20, 2010
Fajr	3:30-5:26 am	6:19-7:47 am
Dhuhr	1:15-5:24 pm	12:11-2:17 pm
Asr	5:24-9:04 pm	2:17-4:34 pm
Magrib	9:04-11:00 pm	4:34-6:03 pm
Isha	11:00 pm-12:00 midnight	6:03 pm-12 midnight

- Most Lean Manufacturing Operations Do Not Have Excess Capacity Available to Staff Prayer Breaks
- State Law/Other Regulations of Break Times Can Be an Impediment to Solutions
- Law Generally Requires Pay for Breaks Under 20 Minutes; but Paying for Prayer Breaks When Non-Muslims Don't Get One may be Reverse Discrimination
- What Employees Want as an Accommodation can be a Moving Target

Do Not Wait Until You Have a Flood of Requests for Accommodation to Plan Your Response

- Check Job Descriptions to Ensure You Have Identified All Positions Where Presence on Line is Really Needed
- Enforce Existing Bathroom Break Policies as to All Employees
- Be Flexible, but Make a Reasoned Decision About How Far You will Go and Document the Basis for Your Decision
- Consider Hiring Industrial Engineer to Perform the Analysis for You

- Make Employees Be Specific About Their Beliefs and What They Want
 - Prepare a Prayer Break Request Form Requiring Specificity
 - Reserve Right to Eliminate/Change Any Accommodation

Cases Are Winnable But a Win May Not Solve the Business Problem

- Expensive to Defend
- Defeat of Class Certification Means Defending More Suits
- Turnover