Agenda

1 | #metoo: There’s Been A Lot Going On!
2 | The Legal Impact of #metoo
3 | #metoo Best Practices and Practical Pointers
4 | Proposed Changes to EEO-1 Filing
5 | Proposed Changes to Join Employer Rule
6 | Proposed Changes to Overtime Calculations
7 | DOL Audits
#metoo
#timesup
#wherearewenow

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There's a lot Going on!
The Headlines
Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment

#MeToo: Mandy Moore & half a dozen other women accuse Ryan Adams of sexual misconduct

Steve Wynn resigns from Wynn Resorts after sexual harassment allegations

MONICA LEWINSKY: EMERGING FROM “THE HOUSE OF GLASSLIGHT” IN THE AGE OF #METOO

Moonves ousted as CBS chief

New York Times reported Google paid Android co-founder Any Rubin $90M after it learned of a sexual misconduct allegation

20,000 employees staged a walkout (20% of Google’s total employees)

- End to forced arbitration for issues of sexual harassment and discrimination
- Commitment to end pay and opportunity inequality
- Publicly-released transparency report regarding sexual harassment at the company
- Inclusive and clear sexual misconduct reporting process
- Appointment of a Google employee representative to the board of directors
- Elevate the status of chief diversity officer, allowing the position to answer to the CEO and make recommendations to the board of directors.
- The group has also brought attention to the lack of racial and ethnic diversity and low retention rates among underrepresented groups.

R. Kelly Faces a #MeToo Reckoning as Time’s Up Backs a Protest

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#MeToo and #TimesUp

**The Movement**

2006 - Tarana Burke coins #metoo

The New Normal?
Allegations of misconduct may have peaked, but remain ahead of past trends.

- Accused
- Replaced

EEOC issues proposed guidelines
Harassment
Discrimination

Source: Temin & Co.
#MeToo

• On October 15, 2017, Alyssa Milano asks her Twitter followers who have been sexually harassed or assaulted to reply “me too” in order to amplify the magnitude of the problem.
• On Twitter, over 68,000 respond to her tweet directly.
• On Facebook, the hashtag is shared more than 12 million times in the first 24 hours.

#metoo - Scope

• 417 high-profile people accused since December 2016
  • 193 were fired or left their jobs
  • 122 have been put on leave, suspended or are facing investigations
  • 69 people - no repercussions
• More than 96 million tweets from 2010 to 2017
• A recent found that the #MeToo hashtag was used more than **19 million times** on Twitter since Milano’s initial tweet.
  • 55,000 uses of the hashtag per day
#timesup

• TIME’S UP is an organization that insists on safe, fair and dignified work for women of all kinds.

• Powered by women, our TIME’S UP™ programming addresses the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential.

• Started by over 300 women in Hollywood, including Reese Witherspoon, Natalie Portman, and Shonda Rhimes.

• Time’s Up Legal Defense Fund – raised $21 million in just two months.
The EEOC Stats.

- 2016 fiscal year – 6,758 charges alleging sexual harassment
- 2017 fiscal year – 6,696 charges alleging sexual harassment
- 2018 Preliminary Data –
  - $16 million budget increase for EEOC
  - First budget increase in 8 years → #metoo
- EEOC in process of releasing updated enforcement guidance on sexual harassment
  - Last updated in the 1990s
  - Transgender
  - Sexual Orientation
  - Gender Identity

Sexual Harassment Claims on the Rise

2018 EEOC Activity

- 50% more sexual harassment lawsuits than 2017
- Recovered approximately $70 million for sexual harassment victims ($47 in 2017)
- Sexual Harassment Charges of Discrimination up by over 13%
- “We are at a transformative moment in our history, and the EEOC will be part of making that history.”
New York Timeline

April 12, 2018
Non-employees protected under NYS Human Rights Law

July 11, 2018
Prohibited use of non-disclosure and mandatory arbitration

October 9, 2018
Anti-harassment policy must be distributed

January 1, 2019
State contract bids must contain affirmation of compliance

April 1, 2019
Mandatory training for all employees must be complete

NEW YORK CITY
Mandatory training for all employees must be complete

Best Practices and Practical Pointers

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Examine Workplace Culture

• Survey the workforce to determine the extent to which harassment is a problem within the organization
  • Consider using a third-party service
• Assess whether employees feel encouraged to report harassment
• Examine workplace culture to ensure policies and management support a culture of openness, respect, and compliance
• Identify important corporate and cultural values and align those values with company policies
• Ensure supervisory employees are aware of, promote, and act in accordance with those values

Identify Situational Risks

• Does the client workforce have significant cultural and language differences?
• Does the client workforce have significant age or gender imbalances?
• Does the company value customer satisfaction over employee well-being?
• Does the office have any isolated workspaces?
• Do you have a workplace cultures that tolerates or encourages alcohol consumption?
• Are there any workplace violence risks?
  • Many times sexual harassment is also workplace violence – i.e. assault
Review and Revise Handbook Policies

- Review and update anti-harassment/discrimination, anti-retaliation, and reporting policies
- Updated policies should include strong anti-harassment and anti-retaliation language
- Handbooks should include a clearly articulated complaint procedure with multiple avenues for reporting misconduct, including investigation

Training!

- Empower employees with knowledge
  - No-Harassment and Discrimination training
  - Clear and accessible compliant procedures
- Emphasis an open and non-judgmental culture and environment
- Three Trainings:
  1. Employees
  2. Managers
  3. Complaint Recipients
Responding to a Complaint

• Have you identified a response team?
• Do they know how to conduct a compliant intake?
  • Can they sensitively and appropriately respond to an emotionally distressed employee making a complaint?
• Do they know how to diffuse a potentially violent situation?
• Is there a compliant hotline in place
• Have we introduced an Employee Assistance Program?

Conducting Investigations

• Does the response team know how to conduct an investigation?
  • What questions should they ask?
  • What format should they follow?
  • In what environment should they conduct the meetings?
• Do they know how to take notes?
• Have they considered using outside counsel?
• Will they provide a written report?
  • Do they understand the pros and cons?
Learn From the Past

- How has your organization handled sexual harassment, misconduct, and assault allegations in the past?
  - What worked?
  - What didn’t work?
  - Any pattern to charges of discrimination/lawsuits?
- Review the response plan
  - Consider the credentials and experience of the response team
  - Who is effective at handling difficult conversations with employees
- Who are your “problem” employees? Managers? Leaders?

Proposed Changes to EEO-1 Filing
EEO-1 Filing

• Employers with 100+ employees and some smaller federal contractors are required to file annually.
• Currently requires disclosure of number of employees in various racial, ethnicity, gender and occupational categories
• In 2016, EEOC modified requirements to require wage and hour data starting in 2018
• In 2017, requirement was pre-emptively suspended based on concerns related to burden on employers and privacy concerns

EEO-1 Filing

• 2017 & 2018 Forms did not include wage and hour data
• On March 4, 2019, Federal Judge ruled that a new EEO-1 form with wage and hour data “shall be in effect”
• Problematic because 2018 filing period is open until 5/31/19 but new form with wage and hour disclosures is not available yet
• Not clear whether employers need to disclose for 2018 report; may have to amend/ supplement report
• On 4/17/19 Judge gave parties until 4/22/19 to submit additional papers.
## Sample EEO-1 Form

### SECTION B - COMPANY IDENTIFICATION
- Name: LinkedIn Corp
- Address: 2200 Steiner Court, Mountain View, CA 94043

### SECTION C - TITLE FOR FILING REQUIREMENT
- 1-2 or 3-5

### SECTION D - EMPLOYMENT DATA

<table>
<thead>
<tr>
<th>JOB CATEGORY</th>
<th>MALE</th>
<th>FEMALE</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE OR EQUIVALENT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PROFESSIONAL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TECHNICAL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUPPORT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FREQUENCY REPORT TYPE</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### SECTION F - REMARKS

This is the proposed EEO-1 Form to collect compensation data.

## Sample Proposed EEO-1 Form

### SECTION D - EMPLOYMENT DATA

<table>
<thead>
<tr>
<th>JOB Category</th>
<th>Annual Sales $ Thousands</th>
<th>Non-Executive or Office</th>
<th>Executive or Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500,000 and under</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$500,000-$999,999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$1,000,000-$2,999,999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$3,000,000-$4,999,999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$5,000,000-$9,999,999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$10,000,000 and over</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Section C - Title for Filing Requirement

- 1-2 or 3-5

### Section B - Company Identification

- Name: LinkedIn Corp
- Address: 2200 Steiner Court, Mountain View, CA 94043
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Proposed Changes to Joint Employer Rule

Proposed FLSA Joint Employer Rule

- Hot politically contested issue
- Old Test: “Not completely disassociated” standard
- Broad (old test) vs. Narrower (new test)
- New rule would reverse the NLRB’s Browning-Ferris case
- Comments due by 6/10/2019
- Workers via Temp Agencies or Franchisee/Franchisor relationship could be impacted

- New Test: 4 factor test proposed to replace old test:
  - Hire or Fire the employees
  - Supervise and control the employee’s work schedules or conditions of employment
  - Determine employee’s rate and method of payment; and
  - Maintain the employee’s employment records
Proposed Changes to Overtime Calculation

- DOL proposed changes to definition of “regular rate of pay”
- Regular Rate of Pay is used to calculate overtime rate
- Not just the hourly rate
- Complex and outdated
- Currently, non-discretionary bonus included in regular rate. If not paid weekly, must be prorated over the prior applicable workweeks which could increase overtime.
- Proposed rule removes some of the items currently included when calculating the regular rate
- Impact: reduce Overtime rates in some circumstances
- Comments due by 5/28/2019
Proposed Changes to Overtime Calculations

- Proposed rule would exclude the following from calculation of regular rate:
  - Cost of providing wellness programs, on site specialist treatment, gym access and fitness classes and employee discounts on retail goods and services;
  - Payments for unused paid leave, including paid sick leave;
  - Reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
  - Reimbursed travel expenses that don’t exceed the maximum travel reimbursement allowed under FTRS regs and satisfy other regulatory requirements;
  - Discretionary bonuses;
  - Benefits plans; and
  - Tuition plans, tuition reimbursement or repayment of educational loans
Proposed Changes to FLSA Exemption Rules: Salary Threshold Change

<table>
<thead>
<tr>
<th>Current Salary Threshold</th>
<th>Proposed Salary Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>• $455/ per week or $23,660 annually</td>
<td>• 2019: $679/week ($35,308 annually)</td>
</tr>
<tr>
<td>• Highly Compensated employee: $100,000 annually</td>
<td>• 2016: $913/week ($47,476 annually)</td>
</tr>
<tr>
<td>• No automatic increases</td>
<td>• 2019: $147,414 annually</td>
</tr>
<tr>
<td></td>
<td>• 2016: $134,004 annually</td>
</tr>
<tr>
<td></td>
<td>• No automatic increases but DOL to review every 4 years</td>
</tr>
</tbody>
</table>

Proposed Changes to FLSA Exemption Rules

• No Changes to duty requirements
• Litigation pending
• Comments due 5/21/2019
• Finalized rule anticipated for 2019
• Effective date unknown but anticipated to be 1/1/2020
Practical Tips

What can/ should an Employer do?

- Review salary levels and duties for all employees and confirm compliance with current rules and confirm if you have any employees who will no longer be exempt if proposed changes are adopted.

- Beware of potential morale issues or potential appearances of disparate treatment
  - Some employees will receive increase in compensation.
  - A senior female manager making slightly more than lower level male manager once salary increased to meet threshold.

- For employees who will no longer be exempt, Employer can:
  - Schedule so employee does not incur overtime hours
  - Budget for cost related to overtime hours
  - Hire additional employees in order to avoid overtime
  - Increasing employee's salary so they meet new threshold
    - If employee works overtime, the increase is not significant or there is only 1 employee in that position than this may be more cost effective
    - If the increase is $2,500 and you have 100 employees in that position than cost of increase would be $250,000.

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DOL Audits

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DEPARTMENT OF LABOR AUDIT

- Department of Labor (DOL) is currently doing random audits
  - Several industries targeted- healthcare (hospitals and nursing homes), construction industry
- DOL requests employee interviews and records
- What should you do if the DOL shows up at your location?
  - Be polite and courteous
  - You do not have to allow them to conduct interviews or turn over documents that day
  - Tell them you would like to contact counsel
  - Contact corporate office and counsel

DEPARTMENT OF LABOR AUDIT

- Main Issues:
  - Worker Misclassification
  - Recordkeeping
  - Overtime calculations
  - Independent contractors
Worker Misclassification

- DOL asks to review information for “salaried” employees
- Why does the DOL care?
  - Overtime is due unless salaried employee is “exempt” from the wage laws
  - To be an “exempt” employee under state and federal wage laws, employee has to meet certain criteria

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Worker Misclassification

**Overtime** = anything over 40 hours/week

**Overtime pay** = 1.5 x regular rate of pay

**Main Exemptions:**

- Executive Exemption
- Administrative Exemption
- Professional Exemption
Worker Misclassification:

Executive Exemption:

- Employee must be compensated on a salary basis of a rate not less than $455 per week (new proposed $35,308)

- Primary duty must be managing the enterprise or managing a customarily recognized department or division of the enterprise

- Must direct the work of at least 2 or more full time employees (or their equivalent)

- Must have the authority to hire or fire or employee’s suggestions are given particular weight
DEPARTMENT OF LABOR AUDIT

Worker Misclassification

Administrative Exemption:

- Employee must be compensated on a salary basis of a rate not less than $455 per week (new proposed $35,308)
- Primary duty must be the performance of office or other non-manual work directly related to management of general business operations or customers.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

DEPARTMENT OF LABOR AUDIT

Worker Misclassification

Professional Exemption:

- Employee must be compensated on a salary basis of a rate not less than $455 per week or $23,660 per year (new proposed $35,308)
- Primary duty must be performance of work requiring advanced knowledge.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Worker Misclassification – Example

- Front desk employee does great job for many years.
- She supervises 2 part time employees.
- Office gives her a “promotion” and moves her from hourly to salaried - $1000.00 per week.
- Once on salary, she does not record her hours.

Worker Misclassification – Example

- Fired for misconduct
- She sues Office
- Says she worked 70 hours per week for 60 weeks
- Says she was not properly exempt so she should be paid overtime
Worker Misclassification – Example

What does the law say?

- She does not fall into any exemption
- She is due overtime + liquidated damages
- Because she is not exempt – office had obligation to keep records of hours worked

$1,000 / week = $25 / hour

$25 / hour x 1.5 = $37.5 overtime rate

$37.50 x 60 wks x 30 hrs = $67,500

$67,500 x 2 (liq. damages) = $135,000

(plus attorneys’ fees on both sides)
DEPARTMENT OF LABOR AUDIT

Worker Misclassification

○ What should you do now?
  - Review all exempt employees and their duties
  - Do they fall directly into an exemption?
  - Remember – exemption is based on actual duties, not job title
  - Fact intensive – case by case basis
  - Seek legal advice

DEPARTMENT OF LABOR AUDIT

RECORDKEEPING
### DEPARTMENT OF LABOR AUDIT

#### RECORDKEEPING

Employers must keep records of:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee’s workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee’s wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

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#### DEPARTMENT OF LABOR AUDIT

#### OVERTIME CALCULATIONS

- If pay period is every 2 weeks – must calculate overtime for each work week (not based on over 80 hours for pay period).

- Example:
  - Employee works 30 hours week 1
  - Employee works 45 hours week 2
  - Overtime due week 2 for the 5 hours
INDEPENDENT CONTRACTORS

- Extremely hot topic with DOL and IRS
- How can it apply to your Office?
  - Cleaning Service – individual or company?
  - Employees working after hours doing cleaning.

Example #1 - Individual cleaning person

- No other clients
- You control details of work
  - Day / Time
  - Instructions about how office is cleaned
- Person is likely an employee, not an independent contractor
Example #1 - Individual cleaning person

- Tips:
  - Change person to an employee; or
  - If person works under 40 hours/week and is paid at least the minimum wage for all hours worked – keep detailed records of hours worked.

  - Still risky; could be tax implications

Example #2 - Regular employee works after hours to clean office

- Employee is not an independent contractor
- Employee is due overtime for all hours worked
- Must add up all hours worked in both positions
- Can destroy an exemption
DEPARTMENT OF LABOR AUDIT

INDEPENDENT CONTRACTORS

Example #2 - Regular employee works after hours to clean office

○ TIPS:
  ▪ Don’t do it
  ▪ Pay hourly and overtime for both positions
  ▪ Seek legal advice to fix any current issue

QUESTIONS?

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