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Preparing for the Next Generations of Workplace Leaders: How to Attract and Retain Talent While Minimizing Legal Risk

Employment Policies

Over the next five to 10 years, Baby Boomers will start retiring in high numbers. This means that the values, expectations and work styles that have shaped modern business for several decades will be exiting center stage, while the younger generations will begin dominating the workplace. In this *Bloomberg Law Insights* article, Neal Gerber & Eisenberg partners Gerald Golden and Sonya Rosenberg and Neal Gerber & Eisenberg COO Sonia Menon look at how the generations that follow the Boomers—Generation X (born between 1965 and 1980) and the Millennials (born between 1981 and 2000)—will shape and legally challenge our organizations.

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Over the next five to 10 years, Baby Boomers will start retiring in high numbers. This means that the values, expectations and work styles that have shaped modern business for several decades will be exiting center stage, while the younger generations will begin dominating the workplace. So, what do we know about the generations that follow the Boomers—Generation X (born between 1965 and 1980) and the Millennials (born between 1981 and 2000)—and how will they shape and legally challenge our organizations?

A. The Next Generations of Leaders: Gen X and Millennials, Unpacked

Gen X is often referred to as the middle-child, as it is bookended by two much larger and noisier generations. There was a time when Gen Xers had the reputation generally of being apathetic, private, skeptical, and lacking in work ethic. That is no longer the case. Today, Gen Xers are considered the most balanced, engaged and happy employees in the workforce. While they are not digital natives like the Millennials, Gen Xers rely on and have high demands for technology in the workplace to be able to multitask and achieve the flexibility they desire. They value a work-life balance; in fact, they were the first group to bring this concept to the work-

place. They want quick results and are focused on getting the job done, but also seek flexibility to value both their professional and personal freedom. Unlike the Boomers, who tend to be more directive leaders, Gen Xers are collaborative leaders, who value diversity and appreciate the importance of an inclusive work environment.

Gen Xers share many of the same values with their younger counterparts, the Millennials. Millennials grew up during times of rapid change and financial instability, and they are the most diverse generation in history: Over 30 percent of Millennials are non-white, and over 15 percent of them were born in a foreign country. Having not known a world without constant connectivity, Millennials are the most tech-savvy generation in the workforce. In terms of attitudes and outlook, Millennials have a strong interest in collaboration and teamwork, are willing to work hard as long as they are given flexibility, have a strong sense of social responsibility and greatly value transparency. Companies that are able to establish trust with their Millennial workers are more likely to be rewarded with their loyalty and to see less defection and job-hopping by their young talent.

B. Effective Recruiting and Retention Strategies for Gen Xers and Millennials

We have all read about progressive companies, most prominently start-ups and tech companies in the Silicon Valley, that employ cool office spaces and innovative perks to attract and retain Millennials. Although it can be challenging to replicate these trending benefits in more traditional environments, there are smart adjustments many employers are making to successfully attract and retain Gen Xers and Millennials.

For example, more employers are allowing employees the opportunity to work remotely, in some cases coming to the workplace only periodically or on an as-needed basis. In addition, there is a growing trend toward more relaxed dress codes, further blurring the lines between work and home. Many companies have implemented Bring Your Own Device (BYOD) policies, allowing their workers to select their device of choice for personal and work-related uses.

Tapping into the growing desire for more flexibility and collaboration, many employers are moving to more open-plan office spaces with added connectivity options that allow employees to work in different work environments, while maximizing collaboration. Recognizing the importance of work-life balance and gender equality, a growing number of companies have modified and expanded time-off and leave-related policies, increasing their paternity and maternity benefits and turning to more flexible and, in some cases, even unlimited, vacation benefits. Additionally, in appreciating the younger generations' desire to be socially responsible, some companies have begun giving employees time off for volunteering, while also creating additional volunteer opportunities within their own organizations.

Capitalizing on Millennials' ubiquitous use of social media and their appreciation for real-time feedback, many companies are starting to implement smart systems and technologies for providing real-time or regular performance reviews rather than the more traditional annual reviews. In addition, instead of relying on feedback from "exit interviews," employers are in-

creasingly conducting "stay" interviews to help gauge and implement effective mentorship opportunities and realistic professional advancement goals, while also addressing the positive and sometimes frustrating experiences their employees report. These smart strategies benefit both Gen Xers and Millennials alike, as Gen Xers' naturally collaborative nature makes them good mentors and leaders to the Millennials, who thrive on recognition and development opportunities.

C. Legal Challenges, Opportunities and Practical Tips for Employers

Employers seeking to attract and retain Gen Xers and Millennials are letting go of many traditional workplace concepts in favor of more flexible and creative strategies. They are looking for ways to create successful opportunities to help encourage a work-life balance, while increasing collaboration, transparency and effective use of technology among their employees. But as employers do this, are they also giving up control over the workplace and how work is performed to the point that employers are undermining risk management and legal compliance?

The reality is that most laws that govern employer policies and practices today were passed decades ago, with the traditional workplace in mind. The existing legal framework was created under the assumption of employees coming to a physical workplace and working normal business hours under in-person supervision.

At the time when most employment laws were passed, flexible and remote work arrangements, expanded-time-off benefits, and other initiatives to increase collaboration, diversity and increased use of technology were not on the minds of legislators. Nevertheless, the arguably outdated legal framework remains in effect, as employer policies and initiatives aimed to attract Gen Xers and Millennials continue to speed ahead.

To stay competitive without increasing legal exposure, employers must be cognizant of the existing legal limitations and challenges, and think through smart strategies to attract and retain their next generations of talent. Some of the emerging workplace trends and their legal implications are the following:

1. Remote and Flexible Working Arrangements Policies and practices that provide employees with additional flexibility as to working times and locations raise some thorny issues and questions, including with respect to the Fair Labor Standards Act (FLSA), workers' compensation and maintenance of a discrimination- and harassment-free working environment.

Enacted in 1938, the FLSA requires that non-exempt workers—i.e., individuals who must be paid overtime for any hours worked above 40 in a regular workweek because their work generally involves functions that are non-supervisory in nature and/or do not entail sufficient independent discretion—must accurately track and record all their time worked. Of course, 80 years ago when the FLSA was passed, the workplace looked quite different. At that time and for many decades that followed, employers could easily track their employees' time worked by requiring them to clock in and out for regularly scheduled shifts at the employer's physical workspace.

As the evolving, multi-generational workplace has challenged the traditional concepts of rigid working schedules and in-person working arrangements, it has simultaneously raised FLSA concerns. If non-exempt employees are able to log in to work remotely whenever they wish—including, for example, at night when an employee might receive and respond to his or her boss's email or text message on a BYOD device—is that time tracked and recorded as compensable time?

Although the FLSA would envision that time spent performing work duties, including responding to emails or text messages, is, indeed, compensable time, the need for accurate tracking and recording poses a real challenge as work and personal spaces blur. What if the employee responding to that work email from her boss at night is simultaneously having a phone conversation with a personal friend on the same BYOD device? Or what if the boss does not require or expect an answer from the employee outside of regular working hours?

Time tracking and recording strategies must be carefully planned and thoughtfully addressed in organizations' time-keeping and compensation-related policies, before any remote or flexible work arrangements go into effect. Relevant policies should expressly state that non-exempt employees must accurately keep track of and record all hours worked regardless of when or where they are worked, and require supervisor approval for any log-ins or work performed outside of normal working hours.

In addition, employers should consider limiting their remote and flexible working time programs to employees who hold higher-level, higher-compensated positions that are deemed to be exempt from the overtime requirements under the FLSA. For many employers, implementing this “exempt only” limitation achieves valuable connectivity and responsiveness from team leaders, without, at the same time, creating an administrative quagmire.

Remote and flexible working arrangements raise a number of additional concerns not anticipated by the traditional workplace laws. For example, the Occupational Safety and Health Administration Act of 1970 (OSHA), at its core, requires employers to provide a safe and healthful working environment. Each state's workers compensation laws require employers to maintain insurance providing for wage replacements and medical benefits for employees who get injured in the course of performing their work. Federal, state and local laws prohibit discrimination and harassment based on numerous protected categories, including sex, race, national origin, religion, age, and disabilities, in all aspects of the employment relationship. But if employers continue to lose control of the physical workplace—and employees are permitted to work when and where they want, wearing what they want—how can employers ensure legal compliance?

For example, if an employee decides to work remotely from home or a local coffee shop, who is responsible if an accident or an incident occurs? It is not difficult to foresee that one can fall or get hurt, or that an individual outside of work premises may be subjected to discriminatory, harassing or otherwise unlawful comments or conduct from non-employees while performing work remotely. If something like that happens and a claim ensues, is the employer responsible? Or, since the employer, by definition, cannot control the

physical workplace in a remote workplace, should the individual be held responsible?

Although existing laws do not offer easy answers to these questions, employers already can, and should, take effective steps to prevent and protect from such legal claims. A remote or flexible work arrangement should not be a free-for-all; its parameters should be expressly defined and limited.

Among other considerations, such arrangements should make clear that employees who choose to work remotely must take responsibility to do so in a safe and productive working environment. If an accident or any problematic conduct occurs outside of the physical workplace, it should be reported immediately so that any appropriate corrective action may be promptly taken.

Under existing federal and state laws, employers may not avoid liability for workers compensation or disability/discrimination claims but, to the extent employees have been given notice and guidelines, such claims may be reduced or defenses may arise.

2. Time-Off-Work Incentives Creative or expanded time-off-work options, while attractive to Gen Xers and Millennials, also can raise legal concerns. For example, the implementation of an unlimited or flexible vacation policy raises important questions regarding the existence and amount of any vacation payout liability for employees' previously accrued, unused vacation balances. Whether and how such balances may be legally reduced or eliminated is a question of state and local laws that tend to vary significantly.

Exacerbating the confusion, some state administrative agencies have issued guidance indicating that unlimited vacation policies still require payment of any earned, unused vacation upon termination of employment. How such payout balance is to be calculated in an “unlimited” vacation scenario remains unclear.

As with flexible work arrangements, the implementation of an unlimited vacation policy also can be tricky for non-supervisory employees, who may improperly use the discretion to take too much or too little time or fail to provide proper notice, creating scheduling- and production-related difficulties.

Accordingly, employers considering an unlimited or a flexible vacation policy should think through the legality of such a policy in their locale(s) of operation, decide which positions to include, check with their counsel regarding existing vacation pay-out liability and options available for legally decreasing it and describe in writing the policy as precisely as possible to minimize exposure. In their unlimited vacation policies, employers should address how their prior traditional vacation policy will phase out, how the notification requirements and time guidelines for taking time off will be tracked, how vacation time will interact with sick/personal time off and, typically, that no days are deemed banked or accrued.

Other time-off initiatives similarly must be crafted with care. For example, parental leave policies that are casually drafted can raise the inference of a discriminatory impact and trigger attention from the Equal Employment Opportunity Commission.

In 2014, the EEOC issued parental leave guidance that states that an employer would be deemed to violate Title VII of the Civil Rights Act of 1964, “by denying job opportunities to women, but not to men, with young

children, or by reassigning a woman who has recently returned from maternity leave to less desirable work based on the assumption that, as a new mother, she will be less committed to her job. Although leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions, if an employer provides parental leave, it must be provided to similarly situated men and women on the same terms.” (EEOC, *Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and related issues*, available at https://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm).

Accordingly, in drafting parental leave policies, employers should distinguish between time off for bonding and time off necessitated by medical conditions associated with pregnancy, childbirth and recovery. While an employer may provide additional time off for pregnant employees and new mothers for medical reasons, e.g., recovery from childbirth, parental time off to bond with a new baby should be provided on equal terms to women and men.

Other time-off work perks also need to be planned with the existing legal framework in mind. For example, if providing time off for volunteering, employers should remind employees to be safe and responsible for any activities they may decide to pursue. Again, time spent in employer-sponsored volunteer activities may result in liability for injuries and harassment as well as disability claims. Notice and, to the extent legally possible, carefully drafted waivers should be utilized with the caveat, again, their enforceability is uncertain. Employers may also need to consider limiting volunteer activity to exempt employees if they are not willing to pay overtime for activities outside the core working hours.

3. Increased Collaboration and Technological Advances
With increased collaboration and technological advances demanded by the Gen Xers and Millennials also come legal risks. For example, as employees increasingly turn to social networking sites, employers have looked for ways to control content on such sites and to be able to take disciplinary action if an employee posts content the employer deems offensive or inappropriate. Employers must tread carefully in this area, as numerous state laws prohibit employers from accessing employees’ password-protected social media accounts, and the National Labor Relations Act has been interpreted to restrict employers’ ability to discipline or terminate

employees based on even the most offensive social media posts or comments when these can be construed to relate to “protected concerted activities.” A social media policy should be drafted with these limitations in mind.

BYOD programs also entail legal concerns. Aside from FLSA-related issues with time tracking and recording, there may be reimbursement requirements depending on the employer’s locale, security-related risks and heightened exposure for and lack of control over potential discrimination and harassment scenarios. Employers can minimize these concerns by checking applicable state law requirements, ensuring appropriate approval and security controls exist—including through required use of mobile device management (MDM) software, and by reminding employees of privacy-related limitations and the requirement of compliance with other policies. Specifically, employers’ policies pertaining to harassment, discrimination, retaliation, trade secrets and other confidential or sensitive information should clearly state that they apply to the employees’ use of personal devices for work-related activities.

D. Concluding Remarks

While the existing legal framework creates a number of challenges for employers seeking to attract the next generations of workers, some recent legal developments do indicate a developing trend toward the recognition and support of the evolving workplace.

Consider, for example, the recent wave of state and local legislation requiring many employers to provide varying amounts of paid time off work for sick or family reasons, the increasing number of equal pay laws and initiatives, and the proliferation of employee laws aimed at protecting employees’ private e-mail and social media accounts. These legal developments indicate a growing legal recognition of the demands for a work-life balance, the evolution of gender and caregiver laws, diversity, transparency and the technological advances that define the Gen Xers and Millennials at work.

Although the law generally lags behind employer initiatives in attracting the next generations of workplace leaders, smart employers are staying mindful of their legal obligations and risks, while implementing creative strategies to attract and retain talent.