



General Counsel Employment Law Report

Prepared By:
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Program Overview
CCHRA Meeting
February 27, 2020

The CCHRA General Counsel, Attorney Michael Foley, will provide a highly interactive explanation of a holistic approach to Employment Law compliance and HR-related risk management within the entire life cycle of the employment relationship:

- Mike will test our understanding of both Massachusetts and Federal employment laws. For example, do you know the answer to these true or false questions:
 - Job descriptions are not required by law and are overrated.
 - If an employee has a "Manager" title and is paid on a salary basis he or she can be considered exempt from overtime.
 - If a worker is free from the employer's control and can use his/her discretion in performing services both under a contract and in fact, then he/she can be retained as an independent contractor and not an employee.
 - In Massachusetts, employers satisfy their obligation to prohibit sexual harassment by posting their sexual harassment policy for all to see.
 - The Commonwealth's Criminal Offender Record Information Law prohibits employers from inquiring about criminal records during the applicant screening process.
- He will outline best practices for developing a strategic approach to effective risk management.
- Mike will also provide compliance tools and resource information. Here is a link to the [2020 Synopsis of Massachusetts and Federal Employment Law and Workplace Regulations](#). This is a very valuable and popular resource that will help your team meet your organization's compliance obligations and will prepare you for Mike's interactive presentation.

This is a presentation you do not want to miss.

Salary History: Fuggedaboutit

Money can be a thorny topic. Many of us were taught it is impolite to ask someone what they earn. Now it is illegal in the applicant setting in [an increasing number of states \(17\) and municipalities \(20\)](#). The laws attempt to end pay discrimination in hiring. Some go so far as to prohibit using salary information *volunteered* by an applicant in determining compensation. And don't confuse a prohibition on applicant salary information with those ubiquitous Sec 7 rights: employees can always discuss salary with each other.

Does that mean any money talk is off the table when hiring? No— as long as it is not a back door to get the salary information. For instance, if you are hiring someone whose compensation would be based on their book of business, you can certainly ask what that number has been. But if that same applicant were on full commission and you then asked what percent of their business they received—bingo. You got the salary information.

Can I ask expected salary information? Yes, but tread carefully. Do not follow up with something like, "Is that more (or less) than you make now?" Salary information can sometimes lead to salary history which is prohibited.

How do I know what to offer for salary? Ask: Where does this position fit in our compensation structure? How much experience would this person bring? How much do I want to pay this person? Sometimes easy information is not the best information. Salary history might not be a great factor to use for your needs.

Don't Forget to talk about your excellent benefits if you like the applicant. Your terrific work culture counts too. Because money is not everything. Or is it money makes the world go around?

Questions? We can help.

Should Employees Instantly Access Wages?

Waiting for payday to spend your paycheck in so last decade. Nationwide, employers are enrolling in instant pay tools—apps— that allow employees to access funds before payroll. Generally used in minimum or lower paid hourly jobs, the instant access is a plus in a tight labor market as reported in the [*Boston Globe*](#).

At the 101 Burger Kings around New England operated by Northeast Foods, turnover has dropped 30 percent since the company started offering DailyPay a year ago to 1,200 employees, said vice president Zohaib Dhanani. The earnings of those who use the service are 15 percent higher than those who don't because they can easily see how much they need to work to pay a bill. "DailyPay users are more motivated to come to work and pick up more shifts," he said. Simply paying workers more frequently, instead of biweekly, isn't practical because of the stress it puts on the payroll department, Dhanani said.

Is this a win-win then? Not everyone is a fan. Employees pay a fee or subscription to access earned time that has not yet been paid. The fees can add up, which is why the state legislatures and Attorneys General are taking notice.

Critics claim it is just a high-tech version of predatory payday loans, which have been outlawed in many states. California and New York are investigating the practice and Massachusetts is monitoring it as well. Worth noting is Walmart, which has 450,000 instant access users in it employ, does not offer the service to its Massachusetts workers because of the strict payroll deduction laws.

We recommend holding off on utilizing this service. Let's go to school on Burger King or Walmart, who can easily absorb the legal challenge.

Questions? We can help.

Tech Workers Kick It Up at Kickstarter

Kickstarter just became the first tech employer with a union comprised of full-time, white collar workers. Kickstarter United is not motivated by the usual union demands—wages and benefits. As a Kickstarter organizer Clarissa Redwine said: “What Kickstarter employees are organizing a union for is the agency to challenge management when management is failing the community. Workers want to be able to participate in critical product decisions without retaliation, to change how the company handles sexual harassment, how it addresses gender discrimination, and they want to take on future challenges with a healthy power structure.”

Whoa. Watch out [Google](#)— who is also learning that gourmet coffee and warm cookies cannot buy worker satisfaction. To be sure, many of the issues brought forth by tech workers address traditional workplace issues like paid leave and benefits—particularly at Amazon. Discontent at Google and Microsoft however run the gamut from protesting against government surveillance contracts to a walk out over how sexual harassment is handled. Collective actions in the technology workplace are so widespread an [online database](#) has been created to document activity.

Whither Kickstarter goes all of tech? Kickstarter is a small enough workplace with enough common interests among employees to make a union work. Behemoths like Google and Amazon are a different story, plus they have been successful in their mighty efforts to stop union organizing. The National Labor Relations Board has become more [employer friendly](#), making it [harder to organize](#) and vote for a union. But do not underestimate the convictions of millennials and the power of a tight job market. As special as they may think they are, tech companies are employers with the same dynamic. They can offer a seat at the table on important issues or wait for workers to kick the door in and take one.

Questions? We have decades of experience with union organizing. We can help.



General Counsel's Office Hours

Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.