



Mark Smith:

That's interesting because, in some senses, it is easier because you're going down the same path you've gone down through several times over the course of time, but to some degree, it's harder because some of the analogies and stories you use are no longer relevant.

Jeff Large:

That's Mark Smith, a shareholder, and attorney in business law at Rhoades McKee. Mark has an impressive background, including being an avid runner, a radio DJ, and practicing law for 41 years.

Mark Smith:

You talk about a ream of documents like, "Hey, this is reading the Encyclopedia Britannica." And people now go, "What's an encyclopedia? Is that like Wikipedia?"

Jeff Large:

Yeah.

Mark Smith:

And so you have to change some of your frames of reference. I mean, the law's been changing from the minute I started practicing, so the fact that we have new laws, new regulations, new interpretations of those two things, that's not a big deal.

Jeff Large:

Today, on Conversations with a Business Attorney, Mark and I discuss a very timely topic, employee recruitment and retention. I'm your host and fellow business owner, Jeff Large. Now, at the time of this recording, there was a lot of talk around this being the Great Resignation or how the US economy is moving towards a recession.

Well, Mark was the perfect guest to tackle this topic, and he offers wisdom throughout the conversation. I think it's going to be especially helpful for you if you're looking for a few things. One, you want to attract and retain new employees. Two, if you have questions about categorizing those employees' roles correctly. Or three, if you are interested in what liabilities are involved in hiring employees or subcontractors.

Mark Smith:

One is the extreme difficulty in finding talent to fit open positions, and the second is the loss of employees who are seeking greener pastures elsewhere.

Jeff Large:

You hear about these topics like the Great Resignation and the news on all of this. Is that accurate to what's really happening from what you're seeing? I mean, are we in a dire time, or is this sort of just another ebb and flow?

Mark Smith:

I would say we're not necessarily in a dire time, and it depends on your perspective. If you were an employee, it's a terrific time because you have leverage in terms of your own employment



situation, and you have opportunities in terms of places that you can go. If you're an employer, it's a little more difficult in order to... because people are mobile now, and looking for new opportunities gives you a chance to attract employees that might not otherwise consider your organization.

Jeff Large:

Another thing that I saw, just, again, to continue kind of painting the stage with your background in particular, another one of your focus areas is construction law, correct?

Mark Smith:

It is.

Jeff Large:

Okay.

Mark Smith:

I think that, yeah, construction, for sure, has been hit harder, and there are a lot of reasons for that. Some of which have to do with immigration policy.

Jeff Large:

Mm-hmm.

Mark Smith:

And some of which have to do with people reevaluating how they want to spend their work life. Do they want to work with their hands, or they want to work with their head? Do they want to go to a more traditional blue-collar or white-collar job from the really kind of hard work associated with construction? I have a client that told me recently they have 500 open positions because people are evaluating what their life looks like and, "Do I want to make widgets for eight hours a day?"

Just the sheer monotony of doing some of that work is causing people to reevaluate their options, and so people that maybe traditionally said, "I can suck it up, do eight hours a day, punch my clock, go in, go out and I'm done," now say, "That really doesn't fulfill my life. I want something else." And maybe it's more dollars, maybe it's more opportunities for advancement. The reasons vary from person to person.

Jeff Large:

Is there anything that you feel like over even the more recent past that you feel like is attributing to the current state of people... it just being harder to get people and to keep people?

Mark Smith:

Like everything, the pandemic kind of served as a dividing line before and after. I mean, we had the recession in 2008, and that caused a lot of difficulty, a lot of unemployment because the demand for consumer and retail goods went down, and so the need to produce those goods went down, and the need to have employees to do it went down. So a lot of people then lost jobs and took any job that was available. It was really pretty desperate times for employees that became unemployed.



Then, as we moved forward, the economy picked up. We got closer to full employment. Things were going great from both the employer and employee perspective. And then, with the pandemic, with everything shutting down, people started reevaluating what it is they were doing and how they were doing it. And, "Now that I've had this time off, do I want to go back to that job, or do I want to pursue something different?" And so we saw almost a flip in the sense of now it's employers that are looking for employees rather than where we were in 2008 where it was a reverse of that.

Jeff Large:

When I think about it, now, clearly, I don't have the same background as you do, but it seems like many employers are going to think about recruitment and retention along the lines of culture, perks, pay, vacation. I think some of this overlaps, but I personally have never really thought about it from the standpoint of legal. Like, how would I talk to my attorney to see how I could improve these things? I want to start a little more open-ended. How does the legal side play into this conversation?

Mark Smith:

There are really two aspects to the legal side. One is counseling the employer in terms of the recruiting process, the sort of questions you can ask, and the inquiries you can make. And then, once the employees have been hired, what kind of mechanisms can you utilize to retain them in terms of, I call them, paper handcuffs? What kind of agreements can you put in place that will assure the employer that this employee is going to stick around for a bit? And there are a number of things that have been developed over the years, non-compete agreements, non-solicit agreements. More recently, what we see are forgivable loan agreements.

We will, for example, give you a \$10,000 signing bonus in the form of a forgivable loan. So if you stay, it's amortized, for example, over the course of five years. So if you stay for five years, you don't owe any of this money back. If you leave before then, you owe it back on a prorated basis. You also see that in retention bonuses. The end of the year, it's not uncommon for a bonus to be given to employees. Employers are starting to say, "Well, how about if we make that in the form of a forgivable loan so that the employee gets a \$30,000 bonus, but they have to pay it back if they move next year to another employer."

Jeff Large:

Mm-hmm.

Mark Smith:

So those are the sort of things that [inaudible 00:07:45] have legal implications in terms of how you structure the programs. There are tax implications, and it can get complicated.

Jeff Large:

Do you find yourself typically representing the company, or do you find yourself typically representing the employee?

Mark Smith:

The company.



Jeff Large:

Okay. So we're looking at this from the company lens.

Mark Smith:

Right. Right.

Jeff Large:

Let's start with just the recruitment side of things. What do you feel like are some of the biggest legal opportunities that employers have when it comes to recruitment?

Mark Smith:

I don't know that the legal side fits in so much in terms of recruitment other than putting together a packages that are extended to employees. I would say on the recruiting side of things, most of the work is done by the HR professionals in terms of designing compensation packages, benefit packages, flexible work schedule sort of things. I mean, lawyers participate. I certainly participate in crafting handbook language that flex time and remote work and things of that nature that have to be done appropriately and then offered to the employees as a benefit.

Jeff Large:

Where do I even start? I guess it's like you're seeing this. I know as employer, I want to find the best people. I mean, maybe if we take it out of, say, the legal realm specifically, what are the things that I should care about? What are the questions even that I should be asking?

Mark Smith:

Well, so you should care about compensation and benefits. The statistics show that a number of people move jobs based solely on the opportunity to improve their compensation, the opportunity to improve their benefits. And the benefits, as I said, now are not just your traditional health insurance, dental insurance, flex spend, time off, that sort of thing. They've really evolved into flexible work schedules, remote work schedules, paid parental leave, four-day work weeks, paid gym memberships, work-life balance, those sort of things. That's the economic side of the process.

But I think that successful companies in recruiting look at selling and... well, demonstrating and then selling what their work culture is. You need to reinforce your values, your vision, and your mission to the potential workforce and find people that are aligned with your values, vision, and mission in the interview process because people that are aligned tend to be more likely to stay as an employee than someone who says, "I hate this place, but they pay a lot of money, and so I'm just going to suck it up and do the work." So they come in miserable, work miserable, go home miserable, but they like the paycheck. That's not a recipe for a long-term employee.

Jeff Large:

Mm-hmm.

Mark Smith:

And it's one thing if you're... have employees that are kind of interchangeable in the sense of, "You can walk up to this station on the production line and do it, and we don't much care about your personality, your vision, your mission, or whatever."



But when you're recruiting for the higher level jobs, the salaried positions, people that are going to be the head of HR, the head of finance or team leaders and that sort of thing, you really need people that are more aligned with your value and your missions. And so, if you have values and missions and a strategy, that should be part of your recruiting process.

Jeff Large:

Yeah.

Mark Smith:

And then you look at things like when you're looking at resumes, is this person a job hopper if they switch jobs every two years for the last 10 years because the past, to some degree, is a predictor of the future. And if someone has just constantly changed, that ought to be a red flag that chances are you're going to be the next line on the resume instead of the long-term employer. I have a number of clients that look at is this potential candidate into sports. Not necessarily just a couch potato watching sports, but did they play sports?

Are they a team player? Are they someone that understands the benefit of collaboration and practices it as part of their social life? How do they volunteer? What do they volunteer for? Showing that they have interests other than just themselves. And how does that volunteer work fit into your values and your missions? So when you look for those attributes, you're more likely to find someone that is going to stay. Retention starts with recruiting. You have to recruit on... the right people on the front end to get them to stay on the back end.

Jeff Large:

While talking about retaining employees, Mark mentioned documents such as non-solicit and non-compete clauses. He explained that they're often used to encourage employees either to stay or create a need for them to stay, and he starts by breaking down the non-solicit clause.

Mark Smith:

So essentially, if most non-solicitation provisions cover two or three things, one is once you leave, "Thou shalt not solicit our clients to come work for yourself or for another competitor." The second thing is they often say, "Thou shalt not solicit our employees to come with you to work for either you or for a competitor." And the third is, "Thou shalt not solicit our vendors to discontinue service with us in order to provide service to you or to a competitor." So that's the big three areas that are typically covered.

Jeff Large:

And then, timing-wise, do those typically have timeframes? Are they indefinite?

Mark Smith:

They usually have a timeframe that's usually consistent with what's in the non-compete agreement, and so it's two to three years is kind of the general range. They actually can be more onerous to a former employee than a non-compete agreement in the sense that the courts haven't imposed geographic restrictions or time-based restrictions on non-solicit agreements. There isn't much case law on that issue, and so, sometimes, the agreements will be broader than the non-compete agreements.



Jeff Large:

Interesting. I mean, I would imagine that is kind of a big deal, especially with the amount of people who can work remote nowadays.

Mark Smith:

Yeah, it really is. And with the mobility in the workforce, people are looking for others to join them as they start new adventures and whatnot. The biggest litigation, though, that comes from non-solicit agreements is the solicitation of former clients and customers. What often happens is the non-solicit agreement will say, "You shall not induce directly or indirectly a customer to patronize you or a competitor."

And then the issue becomes, "The customer found me on their own. I didn't tell them that I went to this new place of employment. They liked the service I provided to them. They went on my LinkedIn page and found out where I was, and they came to me. So I didn't solicit them. They came to me." And some courts will say that was indirect solicitation or your acceptance of their invitation to work with them violates that provision. So even though you may not have a non-compete, you may have a non-solicit that is equally onerous after you leave your employment.

Jeff Large:

Mm-hmm. That's interesting. How then... Maybe the part that I'm a little confused on still is how could a company use a non-solicit agreement to help continuous, say, recruiting and retaining, because it doesn't seem like it's in the best interest of the employee.

Mark Smith:

Well, it isn't, and it's really a question of bargaining power. In today's world, employees are less likely to sign a non-solicit or non-compete agreement, but when the power dynamic changes a little bit, and they need the job, they'll sign it-

Jeff Large:

Mm-hmm.

Mark Smith:

... and then it becomes a tool to keep the employee. Like, "If I can't have you, no one can have you." It's sort of the dynamic. They use it to restrain employees from going elsewhere.

Jeff Large:

Got it. Okay. What about non-competes kind of in that same vein?

Mark Smith:

Well, so non-competes are... again, they're enforceable in the State of Michigan. The case law is pretty clear that they have to be for a reasonable time and a reasonable geography in order to be enforceable. So you can't have a non-compete that says, "Thou shalt never work in this business for 10 years afterwards," unless there's some legitimate business purpose for doing that. So if you're involved in some top secret research project and you know a lot of confidential information relating to that research, it might be appropriate to put you on ice within a given industry for a long period of time because that knowledge may be something that would give a competitor an unfair advantage with respect to whatever it is that's under development.



The geography makes a big difference, and the courts kind of look like, "Well, how far would a client or a customer go in order to receive service from this person?" And if it's unreasonable, we're not going to enforce it. So, for example, if you had a hair salon and they said, "You can't cut people's hair for a 200-mile radius around Grand Rapids if you leave." The court would say it's unenforceable because clients aren't going to go 200 miles for a haircut unless someone has super special skills. But typically, they would impose some sort of geographic restrictions. 15 miles, 20 miles, something like that would be reasonable.

We see that a lot in physician contracts where a healthcare system will say, "You can't compete with us within a 30-mile radius of this office." And it's kind of designed to say, "Okay, clients will travel 10 miles to see the same doctor, but are they going to travel 30? Are they going to travel 40, or are they just going to find someone within the employer's existing practice?" And the hallmark of the enforcement of a non-compete is whether it serves a legitimate business purpose. So to just restrain someone from using their general education knowledge and experience is something that the courts won't do. But to restrain someone from using some confidential insight information, like I alluded to earlier, customer lists, contact lists, that's something the courts would do.

So, for example, if you're a salesman and the company has provided you all the tools to be a successful salesman, over the years, you've developed all kinds of contacts, you've taken customers out for drinks and dinners dozens of times and that sort of thing, and now you go to a direct competitor in the same marketplace, the court would say, "Well, in that circumstance we're going to enforce it." Because the salesperson can use that goodwill and relationship they developed with those clients to the disadvantage of their former employer and to the advantage of their new employer. And it's not just their general education knowledge and experience. It's something they developed with the assistance of their existing employer. So that's the kind of circumstance that we often wrestle with is is there a legitimate business purpose for this restraint on your ability to work?

Jeff Large:

Mm-hmm. So it sounds like these really are more agreements that are helping in terms of protect the business and the retention side of things.

Mark Smith:

It is. Yep, absolutely. Yeah, they're not a recruiting tool. They're almost an anti-recruiting tool.

Jeff Large:

I was going to say on that note, does it make sense to have them with the times, like with the way that... Say, for example, right now, currently as we record this, it seems to be there is more of a higher demand to get new employees-

Mark Smith:

Right.

Jeff Large:

... into the workforce. Does it make sense to have these in place but perhaps change the language so it's only protecting some of these highest levels, or does it make more sense to just not even use them at all in order to favor retention? How do I think about that?



Mark Smith:

It really depends on the size and makeup of your workforce, I think. We went through a trend, certainly a few years ago, where people were using... well, companies were using non-competes, non-solicits for literally almost every employee in the organization. The infamous example was Jimmy John's franchises were using them to keep sandwich makers from going elsewhere.

The hard part about a real flexible approach is if you have 50 people in your workforce that have already signed non-competes. But it turns out they're not very competitive in today's market, are you going to rip all those up, and now everyone has to sign a new agreement because that's what the new kids want as they come in?

So you end up having to start all over again every time you throw some more flexibility in. One of the things that we are seeing is people having been burned previously by non-competes will negotiate so that they're enforceable only if the is discharged for cause or the employee quits, as opposed to, "Well, the economy's kind of tanking. We got to let you go. And oh, by the way, you can't work anywhere else because you've got this non-compete agreement in place."

Jeff Large:

Mm-hmm.

Mark Smith:

So certainly, the executive level, we see much more resistance to a one-size-fits-all that's enforceable regardless of the reason for the termination of employment.

Jeff Large:

Yeah. So, as business owner, should I be thinking about this they need to stay consistent. Say, for example, if there's the more strict version like those employees wouldn't just get grandfathered under that and then the new employees would've the new one, it'd need to be consistent across the board.

Mark Smith:

Well, it doesn't have to be. It's just a question of workforce morale. I mean, if you have a senior salesperson that's got a two-year 50-mile non-compete and the brand new kid out of college has a six-month non-compete with a 10-mile radius, the more senior sales person's going to be aggravated about that.

Jeff Large:

Mm-hmm.

Mark Smith:

And whether they can do something about it's another issue because they have an employment contract in place. But in terms of going back to the retention side of things, morale is important, and keeping the entire workforce happy is important. So you just have to carefully consider the implementation of any change. And it's not to say you shouldn't make change, but you should at least figure the consequence of it.

Jeff Large:



One other thing you mentioned was bonuses, but specifically forgivable loans. Dive into that a little more of kind of the nitty-gritty of how those are working.

Mark Smith:

Sure. So what often happens now is that a company will say, "I really need to attract a new employee, but I don't want to attract them and retain and train them and then lose them. So I'm going to offer a \$30,000 signing bonus, and the bonus is going to be forgivable a third at a time. So, each year that you stay, a third of that signing bonus is no longer repayable to me, and if you stay all three years, you don't have to pay any of it back.

But if you leave early, then you've got to pay it back." And we see that same sort of thing working its way into the annual bonus. "We will give you a year-end bonus, but it's going to be in the form of a forgivable loan so that you've got to stay here for a little while in order for the whole loan to stick. I mean, you get the whole amount at once, but you have to pay it back if you leave early." So it's a different way of restraining employee movement. They can move, but there are financial consequences associated with it.

Jeff Large:

It seems a little more fair. I mean, maybe fair is not the best word. It seems a little like a higher incentive for both parties to take that type of approach, at least at this point.

Mark Smith:

Yeah. Well, if I'm an employee and want to have future options, I'd rather have the option of maybe I have to repay a little money than having to sit on the sidelines for a couple of years unemployed because I've signed a non-compete non-solicit agreement and your eyes are wide open exactly what's going to happen. Whereas a non-solicit, non-compete, if there's a battle about its enforceability, you go to court, and it can take a year or two to get the issue resolved.

In the meantime, what are you doing for your income? Whereas, if it's one of these forgivable loan circumstances, you just look at the amortization schedule and say, "Yeah, they gave me 30. I've got to pay 20 back because I left early." And oh, by the way, new employer, I need a \$20,000 signing bonus to pay off my former employer."

Jeff Large:

Now, obviously, there's a lot that goes into attracting, hiring, and retaining the right people for your business. And many of those factors that you use to attract new employees, things like job flexibility or other perks, are often more complicated than they seem at face value. That's why it's so important to have a partner who can help you understand the potential risks and repercussions.

Mark Smith:

Well, so when we look at, for example, a flexible work schedule, we have to determine can this be offered to just one employee or two employees? [inaudible 00:26:22] you have to look at are there distinctions that might be unintentionally discriminatory. We give Joe and Pete some flexibility, but Betty and Ann don't get the flexibility. They're going to look and say, "Well, this is based on gender." Or flip it around. "We're going to give the working moms more flexibility, but the working men have to be here all the time." We have different expectations.



And so you have to consider both sides of the coin on all those sort of issues, whether it's family leave, "Are we only going to give women time off or we can give men time off as well in terms of paid parental leave?" Now, in some areas, if you're a large enough employer, the Family Medical Leave Act applies to employers with over 50 employees. And then, it requires both men and women be given the same opportunity for unpaid time off associated with the care of, for example, of a new child. But a lot of companies aren't 50 employees, and so they adopt their own parental leave policy. If they do, we need to make sure as legal counsel to reinforce that, "Hey, if you're going to adopt this policy, it's got to apply to men and women both, or you're going to find yourself in front of the Equal Employment Opportunity Commission."

So there are regulatory impositions, I guess, in terms of almost everything you do that need to be considered to make sure that you don't run afoul of the [inaudible 00:28:00] Workers Protection Act or the Family Medical Leave Act or ADA. I mean, [inaudible 00:28:07]... we will accommodate someone for this condition, but not that condition, we may find ourselves in violation of the ADA. We consulted on a pretty regular basis in terms of the development and implementation of programs that create more flexibility in the workplace.

Jeff Large:

So tell me, what are good indicators then that I should be talking to somebody like you for, say, this part of the process?

Mark Smith:

I think anytime that you're going to try something novel or different, you at least consult with counsel to see if the regulators have gotten ahead of you and have already thought about this. So, for example, gym memberships is one of the things I mentioned as kind of a new employment perk. Well, the IRS eliminated the tax deduction for club memberships, so you may have a tax implication for granting that benefit.

The employee would have to account it as earned income. So they go, "Wait a minute, you said I had a gym membership, but I'm paying taxes on it." That's the kind of thing that comes up. And sometimes, it's a combination of both legal and accounting advice, and sometimes, our role is as simple as going, "That's not my lane. You need to talk to your CPA about that." But at least it saves them from going down that road and making a big economic mistake.

Jeff Large:

Yeah. No, that makes sense. There's a lot of things, like I said, that I find super interesting. We move forward to something like values and attributes. And you mentioned, like you said, looking for specific questions. Something I know I like to ask is, what have you done? Say, what have you... how have you improved yourself over the past 12 months, or what kind of maybe learning activities have you done?

I want to see if they are ongoing learners or, like you said, you take this, find out if they're in sports or things in order to look at their own attributes in order to look at what they value, if they align with your values, and if they align with some of these principles that will keep them around for a while or whatever it is. You also said prior to that, at least I think you did, correct me if I'm wrong, about we got to be careful as well of what kinds of questions we're asking. Where are the relationships between that? What do I need to be cautious of or aware of for, say, something like the interview process?

Mark Smith:



Well, there are questions that are red flags in terms of violation of the various laws. So, for example, you can't, in the interview process, ask someone what their age is, and people try to sneak around that by saying, "What were the popular songs when you were in high school?" You can't get into questions relating to religion. You can't get into questions relating to sexual identity.

You can't get into questions relating to disability or drug use, but these broader, more cultural questions that we're talking about are fair game. How do you spend your spare time? What do you do for fun? Those sort of things pull out some personal attributes that are indicators they may work well in your organization.

Jeff Large:

When it comes to the recruitment and retention, from your point of view, what are the best things for me as a company or an employer to know? From your perspective, what do you wish I knew?

Mark Smith:

Well, as an employer, we always hope that our employer clients know that they shouldn't make promises of long-term employment that can be converted into a contract guaranteeing employment for a period of time. Michigan, like a number of other states, is an at-will employment state unless there's a written agreement that provides for a specific term of employment.

Some employers don't understand that. And if you have the company president saying, "If you come here, I guarantee you're going to stay here the rest of your life," that may inadvertently convert into a contract of long-term employment, and that can be problematic.

Jeff Large:

Simply based on verbal?

Mark Smith:

Well, the law says it has to be in writing, but what you often find is there will be some sort of verbal statement. And then the employee will say, "Hey, I really enjoyed interviewing you today, and I really appreciated your offer of basically lifetime employment," and the executive replies in some fashion that seems to affirm that. And then someone will claim that there was a contract formed between those two written documents. We often say, "Any fool with 200 bucks and a lawyer can file a lawsuit."

And so you have something like that. It's pretty skinny, but you might end up seeing a claim arising from that. In terms of other things we wish the employers knew, I mean, a lot of it comes down to those fundamentals in terms of the kind of questions you can ask and can ask. And a lot of it just doesn't really happen because a lot of employers are hiring line-level employees or they really don't ask many of the questions.

I mean, in today's employment environment, like the client that I mentioned that has 500 openings, the question is basically, "Can you fog a mirror because if you have a pulse and a breath, I'm going to hire you." A lot of questions that people used to ask regarding drug use, for example, they don't care. I mean, we've got a lot of employers that used to do drug screenings. They don't do them anymore. They need the employees more than they need assurance that on their off time, they're not smoking pot.



Jeff Large:

Mm-hmm. The example that you gave... I'm going to think out loud. The example that you gave, obviously, is more timely. What have you seen? Is there anything tried and true? Is there anything that you feel like remains consistent despite being in positive economic times, negative economic times that maybe isn't necessarily a trend? Are there baselines that I should be doing or providing as an employer to get this good recruitment and retention?

Mark Smith:

A lot of it comes back to the compensation package. That's probably number one on most employees' lists. "What's my compensation going to be?" And then secondly, "What is this company that is offering me this position? What do they stand for? Is it something for which I have some form of alignment?"

Jeff Large:

So say take something like compensation. How are you advising your clients on that type of topic?

Mark Smith:

There are a couple of areas where we step in, and it's been more frequent over the last couple of years. You may have read about first the Obama Administration's desire to increase base salary levels for white-collar jobs. There are exempt employees, which means they're exempt from overtime, and then there are hourly employees that get overtime. The exempt employee classifications, professional administrative and supervisory, had a salary level of under 30 grand for a whole year's work unlimited number of hours for under \$30,000.

The Obama Administration sought regulations to increase it to the mid-40s, and we had a number of employers dealing with the issue of, "Can we reclassify these people to avoid paying the extra money? Should we reclassify them? How can we deal with this pretty massive increase in terms of the base compensation?" And then, there was litigation that stopped the implementation of those regulations. And then, the Trump Administration went forward with new regulations that essentially split the difference between the old salary level and the proposed salary level.

And so now we're in the mid-30s for those white-collar workers that are exempt from overtime. So we spend a lot of time with our clients talking about does this employee fit within one of these exemptions so that you can pay them the 35. It's a little more than that. It's an odd number, but so that you can pay them that amount and be free of overtime restrictions. And it really... When you have, for example, fast food chains, I mean they have all these managers who are working 60 hours a week for in the mid-30s, but it used to be the mid-20s. And the question is, are they properly categorized as a management position employee?

Do they have enough duties, responsibilities, and authority that fits within the regulatory definition to be... entitled to be treated that way? There are efforts afoot to essentially go back to what was proposed by the Obama Administration to increase that salary level to the mid-40s instead of the mid-30s. We'll have the exact same conversations we had before. Do these employees fit within that categorization? And for some employers, how do we avoid it? How can we put them back on an hourly schedule and save money and have potential overtime pay exposure, but then control it by clamping down on the number of hours they work and things of that nature?



Jeff Large:

Mm-hmm.

Mark Smith:

So we get real active when it comes to the implementation of salary versus hourly work.

Jeff Large:

Mm-hmm. Mm-hmm. Do you find... Are you working with people then that are more already in it, like they're already doing it, or do you find yourself working perhaps with more people that are in the beginning set like of a startup or something that's trying to figure that out?

Mark Smith:

I would say I probably do more of my work with companies that are already in it and are considering how to deal with it. And that's just because the nature of our business is we have a lot of long-term existing business clients, but we also have gotten a number recently, new startup companies.

The Great Resignation led to a lot of people starting up their own little LLCs, and they'll, for example, start up a beauty shop or start up a massage therapy clinic or something, and they need to seek guidance in terms of, "How do we set this up? How do we pay our people? How do we make sure that if we're paying them on commission, we're doing it in a legal fashion that covers their minimum wage and doesn't expose us to a Fair Labor Standards Act case?"

Jeff Large:

Mm-hmm. Now, much of what Mark has been talking about can be divided into three themes, retaining employees, categorizing roles correctly, and understanding the liabilities that you have as the business owner. Again, as owner, this can be very overwhelming, but Mark says you have to just take it a step at a time.

Mark Smith:

You take it in bites. You don't eat a whole whale at once. It's one bite at a time. And so I counseled a client just last week who's a startup, a sole proprietor who needed an administrative assistant. It's like, "Here's the things you got to think about." Is this going to be an employee, a W2 employee, or is it going to be a contractor? If it's going to be a contractor, here's some things you need to do to protect yourself against this potential wage claim that could come up. And okay, so we put in place a contract and... with that person that makes it clear they're an independent contractor, they're working for other people at the same time, and they control their own schedule.

And I mean, there's some things you look at, and then they're going to go on and do business. And then, if the need arises for more help, then we'll say, "Okay, how is this circumstance different? How are you going to compensate this person?" And so, a lot of times, it's just incremental as the company grows. Each incremental step requires an analysis of where things are going and what it is that best protect their interests. So you don't have to recreate the Kellogg's infrastructure because you're going to make a power bar. If you have two people cooking in their kitchen and packaging stuff up, and they're selling them at the market. Even though it's kind of like a Nutri-Grain bar or whatever it is that Kellogg sells, you don't need the whole big infrastructure and ask all those questions that you would for a bigger company.



Jeff Large:

Mm-hmm. Are there telltale signs or indicators to know where I am?

Mark Smith:

The Regulatory Scheme kind of helps you in that regard in the sense that most of the federal regulations that relate to ADA, for example, or Family Medical Leave Act, are triggered by the number of employees that you have. So if you're zero to five, there's not much federal regulatory involvement in your life. You still have to comply with anti-discrimination laws and that sort of thing.

But in terms of the kind of benefits and accommodations and that sort of thing, they're all triggered by certain growth amounts. If you're 15 employees or more, you have some obligations, Family Medical Leave Act, 50 employees or more. The so-called Obamacare, the Affordable Care Act, if you're below that, then your life is different than if you're above it.

Jeff Large:

Mm-hmm.

Mark Smith:

If you have... Say, for example, you're providing massage therapy, then you need to look at, "Are the people I'm hiring licensed? Do they have the regulatory approval to do the work I'm asking them to do?"

Jeff Large:

Mm-hmm.

Mark Smith:

"If I have a small social work agency, what do my contractors or employees have to have by way of licensure in order to do the work?" So it's really hard to have a one-size-fits-all kind of answer.

Jeff Large:

Along with the Regulatory Scheme, Mark explains how your legal agreements also affect your employee retention with things like non-compete agreements and similar. However, our conversation found our way to two easier things that you can do to help improve retention, stay interviews and exit interviews.

Mark Smith:

Going back to this recruiting and retention piece, there are two overlooked tools, I think. One is a stay interview. Talk to your employees during the course of their employment. "How's it going? Are we meeting your expectations? What's going right? What's going wrong?"

And then, for employees that leave, and you're going to have employees leave for any number of reasons, an exit interview is incredibly important to identify trends within your organization. Each employee has their own reason for leaving, but you might see some trends develop, and you need to take those into account. If five exit interviews in a row indicate that the company culture has become poisonous, you ought to take that into account.



Jeff Large:

Mm-hmm.

Mark Smith:

If they all say the compensation is too low or the benefits are below market, that's pretty easy to address. But some of the other things like, "I just found the job boring, or I didn't find it challenging, or it didn't give me growth opportunities." Those are things that collectively need to be taken into account to sort of address the trend rather than just the individual. I mean, you've already lost them, but they can give you some valuable insight. And since they're already leaving, they do so without fear of retaliation. One other thing I really forgot to mention in terms of recruiting, one of the best recruiting tools that we're seeing is referrals from existing employees.

So, something like 88% of employers, when surveyed, indicate that the source of their highest quality new candidates is other employees already within the organization. It's better than headhunters, better than posting something on Indeed or some other job service because you're getting someone that's essentially been vetted by an existing employee. And to encourage that, a lot of employers are starting to use referral bonuses, whether it's cash, whether it's a gift card, whether it's additional days off, vacation time, that sort of thing. It's a great tool, doesn't cost you much money, and it gets you someone that probably is socially aligned with someone who's already within your organization and probably shares many of the same values and aspirations.

Jeff Large:

A big thanks to Mark Smith for sharing his time and wisdom on today's show. If you need help with the legal side of hiring for your business, consider reaching out to Mark or one of his peers. You can learn more at rhoadesmckee.com. That link will be in the show notes. Conversations with a Business Attorney is a project from Rhoades McKee and is produced by Come Alive Creative.

I'm your host, Jeff Large. Thanks to Rachael Workman, Isadore Nieves, Elaine Mohre, and everyone who helped make this episode possible. And if this episode helped answer any of your questions, please make sure you share it with other business owners who are going through similar struggles. Thanks for listening.