The NLRB's Expanding Agenda

Pursue Relevance With a Vengeance!

(the NLRB's Continuing Effort to Establish Relevance)

Today's Agenda

- **Current Status of NLRB – Noel Canning Case**
- **NLRA/LMRA/NLRB Fundamentals**
  - Why It matters to **ALL** Employers
  - "Protected Concerted Activity" – Section 7 Rights
- **The NEW NLRB & Its Expanding Agenda**
  - Handbook/HR Policies
  - At-Will Employment Policies
  - Social Media Policies
  - Confidentiality, Dress Codes, Communications
  - New Rulings on Class Waivers
  - **Union Organizing Support**
    - The "Quickie"/"Ambush" Election Rule
    - Micro Units
    - Perfectly Clear Successor

BRIEF OVERVIEW OF THE NLRB AND THE NLRA, AS AMENDED (LMRA)

- **A. Structure of the National Labor Relations Board (NLRB)**
  - **The National Labor Relations Board ("NLRB" or "Board")** The Board consists of five (5) Members appointed by the President for five (5) years, with consent of the Senate.
  - **The General Counsel of the NLRB –**Final authority on behalf of Board to investigate charges, issue and prosecute complaints; investigate and process representation petitions– Advises Regional Offices
  - **Division of Judges – the Administrative Law Judge ("ALJ")** – hears & decides Unfair Labor Practice ("ULP") Cases

NOEL CANNING (1/25/13)

- **Background** – In 2010 the Supreme Court ruled NLRB must have a quorum (3/5) to act;
- **On 1/4/12** – President Obama appointed 3 of the 5 NLRB Members under the Recess Appointment Clause ("RAC");
- **January 2013** – ***Noel Canning*** – D.C. Ct. of Appeals rules the Recess Appointments were Unconstitutional.

NOEL CANNING (1/25/13)

- D.C. Court of Appeals Held:
- (a) **"the Recess"** is singular (also not simple "adjournment")
- (b) Thus, "the Recess" refers to **Inter**session not **Intra**session recess [these appointments were **INTRA**session]
- (c) Also RAC specifically applies to *"Vacancies that may happen during **the Recess** of the Senate"*
  NOT
  Vacancies "that may exist" during "the Recess."
- Supreme Court Scheduled to Hear Case Late '13/Early '14

Senate Confirmation of Five Member Board

- **TODAY** - For the first time in a decade, the NLRB has 5-Senate confirmed board members:
  - **Mark Pearce (Chairman)** – With Law Firm whose Website Motto is "Our firm specializes in representing union clients in all legal matters"
  - **Kent Hirozawa** – Previously Chief Counsel to NLRB Chairman Mark Pearce
  - **Nancy Schiffer** – attorney for AFL-CIO and United Auto Workers
  - **Philip Miscimarra** – partner at Morgan Lewis & Bockius
  - **Harry Johnson** – partner with Arent Fox

[NOTE – New **GC** is **Richard Griffin**– former GC of International Union of Operating Engineers [nomination pending]

Likely Post-*Noel Canning* Board actions

- Likely Impact (in my humble opinion) is nominal.
- Force the new Board to revisit approx. 200 cases…similar to when the Supreme Court ruled NLRB required a quorum (2010).
- Most likely NLRB will continue with its Expanding Agenda – same Pro-Labor Majority.
- **Pursue Relevance With A Vengeance!**

LMRA

(*aka* NLRA, as amended)

- The foundation of the Board's Expanding Agenda and the cornerstone of the NLRA is Section 7 (Employee Rights Clause):

"Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,

Concerted Protected Activity Section 7 NLRA

- **Concerted** – 2 or more employees – can include, class-action lawsuits, calling a government agency about safety/working conditions, filing administrative charges to remedy sexual harassment, complaining to co-workers, news media or customers;
- **Protected** – activity "for mutual aid or protection"
  - generally involving "wages, hours, or working conditions" (including benefits, safety, overtime, staffing, company policies or "other conditions of employment";
- **Broadly interpreted**
- **However, The protection of Section 7 activity can be lost** by reasons of (1) its means or (2) its objectives (e.g. Reckless or malicious behavior, such as sabotaging equipment, threatening violence, vulgarity, spreading lies about a product, or revealing trade secrets)

The NLRB's

EXPANDING AGENDA

NLRB "Operation Outreach" to Non-Union Employers

- Over the past few years, NLRB has taken a more aggressive approach to nonunion workplace policies. **Why?**
- **Only 6.9%** of the private workforce is **unionized**.
- **Self-Preservation**
  - **Become relevant** to other **93.1% Non-Union**

How Can NLRB Achieve Relevance?

- 1. Educate the Non-Union workforce on "protected concerted activity" & Union Organizing Rights;
-
  - Education: "Protected Concerted Activity" site at https://www.nlrb.gov/rights-we-protect/protected-concerted-activity
  - Rulemaking: Mandatory Poster Regarding Union Rights at http://www.nlrb.gov/poster

[**Important note: Appellate Courts have enjoined the NLRB's rule requiring the posting of employee rights under the National Labor Relations Act. However, employers are free to voluntarily post the notice, if they wish. ?!#&?!**]

- **Expanding the NLRB Agenda**

Expanding Protected Concerted Activity

- NLRB focus:
  - Whether the policy explicitly restricts protected activity ?
  - Whether employees would **reasonably construe** the policy as prohibiting protected activity ?

Expanding Protected Concerted Activity

- NLRB focus:
  - Whether the policy has been used to discipline employees who engaged in protected activity ?
  - Whether the policy was promulgated in response to concerted or protected activity ?

Expanding Protected Concerted Activity

- HR policies ripe for NLRB Review:
  - Employment at Will
  - Social Media
  - Harassment
  - Company Loyalty/Non-disparagement
  - Confidential Information
  - Media Contact
  - Courtesy/Respect/Good Conduct
  - Complaint Resolution
  - No Solicitation/Dist Policy

Expanding Protected Concerted Activity

- All the following have been found to be **UNLAWFUL**:
  - *"At-will employment can not be modified…"*
  - *"Don't release confidential information…"*
  - *"Don't use company logo…"*
  - *"Don't comment on legal matters…"*
  - *"Don't post photos, videos [of Company] …"*

ALL could be "reasonably construed" to restrict Section 7 employee rights

At-Will Policy Statements

- In Feb. 2012, the NLRB found an Employer's At-Will policy **unlawful** [*American Red Cross*, Case No. 28-CA-23443] **:**
  - Employees were required to sign a form acknowledging their "at-will employment" status stating:

    "***I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.***"
  - The GC held this to be a waiver of employees Section 7 rights and a waiver of the employee's right to advocate concertedly…to change at-will status.

At-Will Policy Statements

- In October 2012, the GC issued two Advice Memos recommending the dismissal of unfair labor practice charges alleging employers' at-will policies violated the NLRA:
  - *Rocha Transportation,* NLRB Case No. 32-CA-086799 (G.C. Div. of Advice Memo., October 31, 2012)
  - *SWH Corporation,* NLRB Case No. 28-CA-084365 (G.C. Div. of Advice Memo. October 31, 2012).

At-Will Policy Statements

- GC approved following "At-Will" language:
  - *"No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship."*
  - *"No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing."(GC Opinion 10/12)*

At-Will Policy Statements

- The GC concluded in both cases :
  - Provision does not forbid employees from seeking to change their at-will status or agree their at-will status cannot be changed in anyway.
  - Instead the agreement prohibits the employers' own representatives from entering into employment agreements that provide for other than at-will employment.
  - The GC distinguished the earlier *Red Cross* decision stating that, in *Red Cross*, as opposed to these two cases the at-will language **"more clearly involved an employee's waiver of his Section 7 rights..."**

At-Will Policy Statements

- Review offer letters, employment agreements, handbooks, codes of conduct, and other agreements to ensure "At-Will" language is in line with recent NLRB decisions… and continue to monitor NLRB developments.
- "At-Will" language might chill employees Section 7 if it suggests that policy cannot be changed through union organizing or collective bargaining. Scrutinize any "Waiver" Language.
- Include language: "cannot be changed except by written agreement".

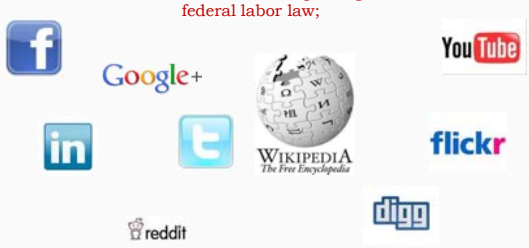
NLRB & Social Media
(One Initial Point)

WARNING!!!!!

THIS WILL MAKE YOUR HEAD HURT!!!!

NLRB & Social Media
(21st Century Water Cooler)

Beginning in 2010, the NLRB, began receiving charges that some policies and disciplinary actions based on Facebook or Twitter postings violated federal labor law;



NLRB and Social Media

- The GC for the NLRB released 3 Reports between 2011-2012 on Social Media Policies emphasizing two key points :

1) Employer policies should not be so sweeping that they prohibit the kinds of activities protected by federal labor law, i.e. discussing wages, or working conditions among employees, and

2) Employee's comments on social media are generally **not protected if they are individual gripes,** not made in relation to group activity among employees.

3) http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media

A CASE STUDY THROUGH THE EYES OF THE NLRB'S GENERAL COUNSEL

Price Edwards & Co.

Case 17-CA-92794

(May 7, 2013)

NLRB & Social Media

- Review of General Counsel's Most Recent Advice Memo on Social Media
  Price Edwards
  Case 17-CA-92794
- On October 1, 2012, Employee posted a status update to her Facebook account from her work computer during lunch, stating:

  The next person who speaks to me as if I am somehow their servant, dumps an unlabeled cardboard box of files in my office, or directs me to do something that isn't my g-d-mn job (have we heard of asking?) is going to wish very heartily that they had not.
- Employer then meets with Employee in to discuss her FB posts

Company Electronic Communication Policy

- **The facsimile machines, voice mail, e-mail and Internet systems are to be used primarily for business communications. Incidental brief personal use is permitted. Instant messaging with friends or surfing the net during working hours is not permitted. Price Edwards & Co. prohibits any communications that are obscene, harassing, discriminatory or inflammatory. No salary information can be transmitted via e-mail.**

NLRB & Social Media

- First GC States Current Law:

"In ***Register Guard***, 351 NLRB 1110, 1117-18 (2007), enforcement denied in part, 571 F.3d 53 (D.C. Cir. 2009), the Board held, based upon its decisions regarding employer-owned equipment, that **employees have no statutory right to use an employer's email system for Section 7 matters, and therefore that employer prohibitions on employee nonbusiness use of the employer's e-mail system are lawful."** [3-2 NLRB Decision]

General Counsel Opinion Is

- (+) "We conclude that the Employer did not engage in unlawful interrogation by questioning the Charging Party about her Facebook comments because her postings about work complaints were not concerted." **Mere Individual Gripe**
- **(–) HOWEVER**, "some of the statements the owner made during that meeting unlawfully restricted the Charging Party's right to engage in protected concerted activities on Facebook during nonwork time (breaks & lunch)."

(Remember No-Solicit Rule;Non-Working Time/Non-Working Area)

- "We also conclude that several of the prohibitions in the Electronic Communications Policy—namely, **the prohibitions on emailing salary information and making "inflammatory" statements—are unlawful,** notwithstanding *Register Guard,* because the Employer permits personal use of its electronic equipment and the prohibitions are vague or overly broad."

GC Advice
(Continues)

- **"Restrictions on emailing salary information and making "inflammatory" communications are facially unlawful under *Register Guard* …because they are content-based restrictions that reasonably tend to chill employees' Section 7[rights]…[and] because discussions about working conditions or unionism have the potential to become heated."**

GC Advice
(Continues)

- (+)**INSTANT MESSAGING:**

"Finally, the Region **should not** allege that the restriction on "[i]nstant messaging with friends or surfing the net during working hours" is unlawful under *Register Guard.* **The restriction treats all "instant messaging" and "surfing" using the Employer's electronic systems during working hours the same."**

GC's Parting ADVICE

- **HOWEVER – "The Region Should Urge the Board to Overrule *Register Guard* "** ***(remember it was a 3-2 decision);***
- "The Acting GC continues to take the position that employees have a statutory right to use an employer's electronic communications systems for Section 7 activities, subject only to the employer's need to maintain production and discipline…"
- [Translation – Even Policy Prohibiting All Personal Use on Company communication systems would be **Unlawful**];
- "Applying these principles, …the prohibition on "[i]nstant messaging with friends or surfing the net during working hours" would be unlawful as well, because employees would reasonably construe it as prohibiting them from engaging in Section 7 activities during nonwork time."

GC's Directive to Regional Office

- *"Accordingly, the Region should dismiss the allegation that Employer unlawfully interrogated the Charging Party concerning her Facebook postings* ***(not concerted)*** *but should issue complaint alleging that the Employer's oral admonitions to the Charging Party regarding her Facebook usage* ("**no more posting at work anytime**") *and its electronic communications policy* ***(nothing 'inflammatory')*** *violate Section 8(a)(1)."*

The GC's Published Memo's & "Lawful" Sample Policy

http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media

- "Rules that are ambiguous …and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful…In contrast, rules that clarify and restrict their scope by including examples …are not unlawful." (3rd GC Memo).

Expanding Protected Concerted Activity

Hispanics United of Buffalo (359 NLRB No. 37)

- Co-workers posted angry Facebook comments in response to coworker criticism:
  "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?"
  - Responses:
  "What the f… Try doing my job. I have 5 programs."
  "What the Hell, we don't have a life as is. "
  - 5 Employees were terminated for violating discrimination and harassment policies.
  - Postings were deemed concerted in nature, even though the postings did not reference group action.
  - The employer's generalized concern over harassment and bullying was insufficient to deem the conduct unprotected.

•Expanding Protected Concerted Activity

-Selected Cases

Triple Play SportsCase

No. 34-CA-12915 (Esposito, January , 2012)

- Employee mad about payroll tax error posts on FB:
  "Maybe someone should do the owners of [Company] a favor and buy …them. They can't even do the tax paperwork correctly!!!…Wtf!!!!"
- Refers to boss as "a--hole"
- Another employee "Likes" FB posting
- Both employees are terminated
- Is this Protected ?
- Employee selecting the "Like" option held protected concerted activity
- Referring to boss as an "a--hole" did not lose protection of NLRA
- ALJ Ordered Reinstatement & Backpay

Bettie Page Clothing and Vanessa Morris, 259 NLRB No. 96 (2013)

- "Thomas and Morris engaged in protected concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood… In the conversation…Thomas explained those concerns were shared by other employees… **Their Facebook postings were a continuation of that effort** culminating in the employee rights handbook being brought to work …"
- Reinstatement & Full Backpay Ordered

Skinsmart Dermatology
Case 04-CA-09422 (2013)

- GC Issued Advice Memo Stating:

"Skinsmart Dermatology did not violate the NLRA when it fired an employee over expletive-laced comments that disparaged Skinsmart in a Facebook group message (10 current and former employees) because those comments consisted of mere "boasting" and "griping" and did not amount to concerted activity."

Expanding Protected Concerted Activity

- Selected Cases (continued)
  - *Costco Wholesale Corp. (358 NLRB No. 106)*
    - Company policy prohibiting employees from posting damaging or defamatory statements about the company on internet or social media sites "overly broad" and restricted employee's §7 rights.
  - *Karl Knauz Motors (358 NLRB No. 164)*
    - Company policy requiring employees to be polite, courteous and friendly to customers, vendors, suppliers and fellow employees is ambiguous/overly broad and could be construed to prohibit §7 protected activity.

Additional Policies Under Review by the NLRB's Expanded Agenda:

- Confidentiality
- Use of Company LOGO's
- Insignia and Dress Code Policies
- Communication Policies
- Media Contacts
- Recordings -Photp
- Harassment
- Solicitation/Distribution
- Off-Duty Access/Off-Duty Conduct
- Chain of Command
- Email Policy
- Fraternization
- "Goals and Objectives," "In the Company's Interests," Cooperation, Loyalty and Attitude Rules

Confidentiality Policies

Banner Health Sys. (Case 28-CA-023438)

- NLRB found employer violated NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing the matter while the employer conducted the investigation.
- NLRB: To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights.

Confidentiality Policies

Banner Health Sys. (Case 28-CA-023438)

- Generalized instruction is insufficient
- NLRB says employers should "first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up."
- Recommendation – Employer should document its justification:
  - Theft case – to preserve evidence or protect witness
  - Harrassment – protect victim
  - Threats or Violence – protect workers, witnesses, target

Communication Policies
(Media, Law Enforcement Officials)

- *DirecTV U.S. Direct Holdings, LLC*, 359 NLRB No. 54 (Jan. 25, 2013), indicates that the NLRB will continue to strictly review handbook policies under Section 7 of the NLRA…**ruling four handbook policies unlawful**;
  - **Media Policy**: "Do not contact the media…" was held unreasonable because employees would construe this language as prohibiting them from communicating about labor disputes with newspaper reporters. Because the rule failed to distinguish unprotected communications, such as maliciously false statements, the Board determined the rule violated Section 7.
  - **Law Enforcement**: "If law enforcement wants to interview or obtain information regarding a [Company] employee, whether in person or by telephone/email, the employee should contact the security department . . . who will handle contact with law enforcement agencies . . ." The Board found employees could conclude that "law enforcement" included NLRB agents whose duty it is to investigate and enforce the NLRA. This provision was deemed "overly broad".

DirecTV Case
(cont.)

- **Third** policy stated employees could "[**n]ever discuss details** about your job, company business, or work projects with anyone outside the Company." The Board held employees could understand the prohibition on discussing "details about your job" to restrict discussion of their wages and other terms of employment.
- **The final policy** statement …prohibited employees from blogging, entering chat rooms, posting messages on public websites **or otherwise disclosing** "**company information**" that was not already disclosed as public record. When reading the last two policies together the Board determined they created the impression that the intranet policy would prohibit disclosure of "employee records," which would include information concerning their own or fellow employees' wages, discipline, and/or performance ratings.

Workplace Videos/Photos

Giant Food LLC (Case 05-CA-064793)

- Social media policy that prohibits photographing or video recording the company's premises violates the NLRA
- Policy could be "interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures and videos, such as of employees engaged in picketing or other concerted activities."

Workplace Videos/Photos

Giant Food LLC (Case 05-CA-064793)

- Employer can't even prohibit use of company logo, trademarks, or graphics
  - Even if Giant Foods had a proprietary interest in its trademarks, that interest is not "remotely implicated" by employees' noncommercial use of those trademarks (i.e., picketing).
- One bright spot: provisions requiring that employees "not defame" or "otherwise discredit" the company's products or services and asking employees to "[s]peak up" if they believed anyone was violating the policy were OK!

Dress Code Policies

- Co. Policy Banned Clothing that may be "racially, sexually or otherwise offensive…or derogatory to the Company."
- Employee Wore > 

- ALJ found **"Protected Concerted Activity"**
- "Demand for better working conditions…and effort to encourage others to support the cause"
  (Alma Products, ALJ Decision 8/14/13)
- *Also See; Wyndham Resort Corp.,* 356 NLRB No. 104
  Employee used "we" and "us"

NLRB Targets Target's Entire Handbook IN

TARGET STORES
359 NLRB No. 103
(April 26, 2013)

Target Stores

- **"Information Security Policy"; "Communicating Confidential Information Policy"; "Use Technology Appropriately Policy" – All UNLAWFUL**

  Because they all: *"…broadly prohibit employees from releasing confidential guest, team member, or company information, sharing confidential information with other employees…"* (**could be wages, etc.!**)

- **Really? –** *"The Board must give the rule a reasonable reading, must refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights."*

Target Stores

No Solicitation/Dist Rule

- "Certain activities are prohibited **at all times** on Target premises. Soliciting, distributing literature, selling merchandise or conducting monetary transactions, whether through face-to-face encounters, telephone, company mail or e-mail, are always off limits (even during meal and break periods) if they are:

  For personal profit
  For **commercial** purposes
  For a charitable organization that isn't part of the Target Community Relations program and isn't designed to enhance the company's goodwill and business. – **UNLAWFUL**

NOTICE TO EMPLOYEES

[Target Ordered to POST (partial list)]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated
Federal labor law and has ordered us to post and obey
this notice.

NOTICE TO EMPLOYEES

[Target Ordered to POST (partial list)]

- WE WILL NOT maintain or enforce the following rules in our team member handbook:
  - **Information security policies that prohibit you from discussing** or otherwise disclosing information regarding **wages,** benefits and other terms and conditions of employment.
  - A no-solicitation/no-distribution policy that prohibits union solicitation and distribution **at all times** on Target premises.
  - An "After Hours" policy that prohibits you from accessing exterior and other nonworking areas of our store premises during your off-duty hours.
  - A dress code that prohibits you from wearing union buttons or other union insignia while at work.

NOTICE TO EMPLOYEES

(last paragraph)

WE WILL rescind the information security, no solicitation/ no-distribution, "After Hours" and dress code rules.

WE WILL furnish all of you with inserts for your current employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or

WE WILL publish and distribute to all of you a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides lawfully-worded rules.

TARGET CORPORATION

NLRB's Expanding Agenda (In Support of UNION Organizing)

- "Quickie Elections"
- MICRO Units
- Employee NLRA Rights Posting Status
- Employee 'Weingarten Rights'
- Other <u>STUFF</u>

Reviving the "Quickie" Election Rule"

- Another likely priority of the new NRLB will be reissuing Quickie Election Rules stalled by the Board's lack of a quorum.
- The aim of the new regulations is accelerate the union election process. It is possible the new board will issue an even more aggressive version of the election rule than previously submitted by the partial Board.

"Quickie" Election Rule

- Shorten the time between the filing of a union-representation petition and the conduct of a union election from 38–40 days to 14–21 days.
- The shorter timeline will radically reduce the ability of employers to effectively communicate with employees, respond to union campaign issues… likely resulting in a higher success rate for Unions.

Current procedures	Proposed procedures
No electronic transmission of documents.	Electronic transmission (potentially to employers).
Pre-Election Hearing is usually **2 or more weeks** after Hearing Notice	Pre-election Hearing within 7 days of Notice
Pre-election right to challenge voter eligibility. (w/ Right to appeal to NLRB)	Challenges involving less than 20% of employee unit deferred until after hearing(No pre-trial appeal)
Voter list due within 7 days of election notice.	Voter list due 2 days after pre-election hearing.
Voter list contains only names and home addresses.	Phone numbers and email addresses added to voter list.
Minimum 25 Days from Pre-Election Hearing to Election.	Eliminates 25 Day Rule.
Today Election is generally held 38-42 Days after Receipt of Petition	Elections would likely be held within 14 -21 Days of Receipt of Petition

Micro Units

- **"Micro-Unit"** is the term used to refer to a small group of employees, who reside within a larger employee group at a particular worksite, that a union seeks to represent.
- *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011)
  HELD – Certified nursing assistants at a nursing home may comprise an appropriate bargaining unit
- Kindred sought to include other Non-Professionals (33 employees) in the bargaining unit with the CNAs (also 33) whom it deems "service and maintenance employees" – resident activity assistants, social services assistant, the staffing coordinator, the maintenance assistant, the central-supply clerk cooks; dietary aides; the medical-records clerk; the data-entry clerk; a business-office clerical; and a receptionist- all of whom work with the residents & nurses.

"Micro Unit" Campaigns

- ***Kindred Nursing Centers v. NLRB*, 2013 WL 4105632 (6th Cir. Aug. 15, 2013)**
  - Affirmed the NLRB's *Specialty Health Care* ruling of 2011.
  - Employer challenging a proposed bargaining unit on the basis that it improperly excludes certain employees must prove the excluded workers share "an **overwhelming** community of interest" with those in the proposed unit. **HIGH BURDEN**
- **Why should employers care?**
  - Smaller bargaining units generally easier to organize
  - Union can CARVE OUT smaller units – "Get in the Door"
  - Smaller units cause inefficiencies in operations
  - Chance of multiple units/multiple unions at same site – more inefficiencies

NLRB "Employee Rights" Notice Posting

- **"Appellate courts have enjoined the NLRB's rule requiring the posting of employee rights under the National Labor Relations Act. However, employers are free to voluntarily post the notice, if they wish."** http://www/nlrb.gov/poster
- The Practical Consequence is **AWARENESS**
- Coupled with Quickie Election Regs & Micro Units
- Equals substantially greater pressure on Employer (HR) to be proactive.

Chattanooga VW workers file ULP Charges

(Chattanooga Press 10/17/2013)

- The United Auto Workers Union has taken the position that, based on the prohibition on "company unions" it would be illegal under U.S. law to establish a German-style Works Council without the union first being installed as the collective bargaining agent for the plant's workforce

Return of Weingarten Rights to Non-Union Employees???

- On November 2, 2001, the U.S. Court of Appeals for the D.C. Circuit, in Epilepsy Foundation of Northeast Ohio v. NLRB, 2001 WL 1344062 (2001), affirmed NLRB's decision to **extend to nonunion employees the right to request that a coworker be present during an investigatory interview** that the employee reasonably believes might result in disciplinary action.
- On June 9, 2004, NLRB reversed course. **In a 3-2 decision**, the Board held that nonunion employees do not enjoy Weingarten rights. IBM Corp., 341 NLRB No. 148 (2004).
- Be Prepared !!!

"Successor Employer"

*(Under NLRA)

- (1) "Successor" Employer typically acquires business (assets) with a Union.
- Successor work force consists of a majority of predecessor's employees.
- Successor can implement initial terms and conditions of employment (including wage and benefits)
- But "successor" must recognize the Union and bargain new contract.

"Perfectly Clear Successor" Rule

- A "**Perfectly Clear Successor**" is a "Successor Employer" that has impliedly accepted the terms and conditions of the Predecessor's union contract by leading the former Predecessor employees to believe their wages, benefits & terms of employment would continue unchanged upon accepting employment with the Successor.
  - **A "Perfectly Clear Successor" cannot unilaterally set the initial terms and conditions of employment**, instead it must maintain the terms and conditions of employment contained in the union contract until a new agreement with the union is achieved or negotiations reach an impasse.

S & F Market Street Healthcare v. NLRB, 570 F.3d 354 (D.C. Cir. 2009)

- In *S&F*, the employer purchased a nursing home from a seller that had two collective bargaining agreements
- *S&F* hired majority of the predecessor's employees. *S&F* provided there would be "significant operational changes" including:
  - Offer of employment was contingent on passing a drug test, physical exam, and background check
  - The employment offer stated employment was "at will" (rather than terminable for cause as in the prior union contract).
  - The employees must agree to *S&F's* internal dispute resolution procedure as a condition of regular employment

- The NLRB held that *S&F* was a "perfectly clear" successor and was obligated to recognize the SEIU and bargain before any changes in employment.
- The Court of Appeals disagreed, and found "no employee could have failed to understand that significant changes were afoot."
  - By announcing employment at *S&F* would be "at will" *S&F* was announcing a very significant change in the terms and conditions of employment.
  - The Court of Appeals ruled, that the NLRB's focus on changing of the "core" terms of employment misstated the rule, and all that is necessary is the successor employer conveying its intention to set its own initial terms and conditions rather than adopting those of the prior employer.

S & F Market – Lesson

- A successor employer should be able to avoid the obligations of the prior employer's contract by clearly informing employees that alternative terms will apply if they accept employment with the successor.
- Err on the side of being overly explicit and inform employees you don't intend to be bound by the old labor contract
  - As seen in the Court of Appeals decision, the NLRB did not give employees the credit to reach the common-sense conclusion that their new employer did not intend to be bound by the old labor contract
  - **NOTE: This applies in the Federal Contractor setting. Successful Bidder MUST be proactive if wishing to be "Successor" instead of "Perfectly Clear Successor" !**

Mandatory Arbitration/Class Action Waiver

Clash of Federal Statutes

- The Federal Arbitration Act (FAA) requires that arbitration agreements be enforced according to their terms
- The U.S. Supreme Court has repeatedly upheld Mandatory Arbitration Agreements that waive the right of employees to file class or collective actions under federal or state employment laws under the FAA.
- The National Labor Relations Act protects the right of employees to engage in protected concerted activity.
- In ***D.R. Horton***, the NLRB decided that such a waiver in a Mandatory Arbitration Agreement is an unfair labor practice because it restricts the right of employees to engage in concerted activity affecting working conditions.

Mandatory Arbitration/Class Action Waiver

D.R. Horton

(357 NLRB No. 184, 2012)

- **The NLRB Held**: "[P]ursuant to the MAA, all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived…employees are required to agree, as a condition of employment, that they will not pursue class …litigation of claims in any forum, arbitral or judicial."

  ***

  "We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."

- ***Horton*** **has been rejected by the 2nd, 8th & 9th U.S. Circuit Courts; and is currently awaiting 5th Circuit decision.**

Applebee's

(ALJ Biblowitz, 9/30/13)

- Mandatory individual arbitration policy maintained by a company that operates over 400 Applebee's restaurants ran afoul of NLRA as the NLRB interpreted it in its controversial D.R. Horton decision.
- The policy could be understood by employees as prohibiting them from filing collective or class wide legal actions against the company in any forum.

Applebee's

(ALJ Biblowitz, 9/30/13)

- *"The Board clearly was saying [in Horton] that Section 7 rights include the right to collectively bring court and arbitral actions. Therefore, it is clear to me that the restriction [is] unlawful even with the proviso that employees maintain their right to file charges with the Board and other governmental agencies."*
- ***"Further, while I agree with counsel for [Appleby's] that the courts have "discredited" the Board's Horton decisions, I am bound by that decision."***

The END!!!

- *You should now have a better understanding of the meaning of:*

Pursue Relevance With a Vengeance!

(the NLRB's Continuing Effort to Establish Relevance)