

# DEVELOPMENTS IN LABOR LAW



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**RECENT NATIONAL LABOR  
RELATIONS BOARD (NLRB)  
FOCUS**

# **RECENT NLRB FOCUS OVERVIEW**



- Election Procedures
- Increased Employee Handbook and “Work Rules” Scrutiny
- Company E-Mail Use for Union Organizing
- Off-Duty Access
- Social Media Policies
- Union Dues

# ELECTION PROCEDURES



- Effective April 15, 2015, the NLRB adopted a 733-page “Final Rule” that changed the Board’s union election procedures
- Generally, the “Final Rule” governing representation-case procedures is designed to remove unnecessary barriers to the fair resolution of representation questions

# ELECTION PROCEDURES



## “FINAL RULE” MAIN FOCUS

- Modernizing Board Procedures
- Streamlining Board Procedure & Reducing Unnecessary Litigation
- Increasing Transparency

# ELECTION PROCEDURES



## MODERNIZING BOARD PROCEDURES

- Electronic filing/communications
- Election voter list

# ELECTION PROCEDURES



## STREAMLINING BOARD PROCEDURE & REDUCING UNNECESSARY LITIGATION

- Identifying disputed issues
- Litigation of eligibility & inclusion issues
- Post hearing oral arguments & briefs
- Review of regional director rulings
- Review standard for post-election issues

# ELECTION PROCEDURES



## INCREASING TRANSPARENCY & STANDARDIZING BOARD PROCESS

- Earlier & more complete info to the parties
- Earlier & more complete info to employees
- Scheduling hearing



# ELECTION PROCEDURES



## “FINAL RULE” STATISTICAL ANALYSIS

- WSJ analyzed whether new rule actually created quicker election times.
- Data considered medium number of days between the filing of a representation petition and the day on which employees vote.

# ELECTION PROCEDURES



## “FINAL RULE” STATISTICAL ANALYSIS

- UNCONTESTED ELECTIONS

38 days dropped to 23 days

- CONTESTED ELECTIONS

59 days dropped to 25 days

# EMPLOYEE Handbook & “Work Rules” Scrutiny



- On March 18, 2015, the NLRB issued Memorandum GC 15-04 providing guidance regarding the legality of employer work rules
- The Memorandum was published to provide guidance on the NLRB’s view on evolving labor law but it does not change the law
- The main objective of Memo GC 15-4 is to incentive employers to review their handbooks and other work rules

# EMPLOYEE Handbook & “Work Rules” Scrutiny



## MAIN TOPICS ADDRESSED IN GC 15-04

- Rules regarding confidentiality
- Rules regarding employee conduct towards the company
- Rules regulating conduct towards other employees
- Rules regarding employee interaction with 3<sup>rd</sup> parties
- Rules restricting use of company logos, trademarks, & copyrights
- Rules restricting photography and recording
- Rules restricting employees from leaving work

# COMPANY E-MAIL USE FOR UNION ORGANIZING



- The NLRB has found that employees have the right, during “nonworking time,” to use company email system for union organizing and other activity protected under the National Labor Relations Act (NLRA).

# COMPANY E-MAIL USE FOR UNION ORGANIZING



## PURPLE COMMUNICATIONS, INC. AND COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

- The NLRB Purple Communications decision overturned its 2007 *Registered Guard* decision which found that employees have no right under the NLRA to use their company's email system for union organizing protected under Section 7 of the NLRA.

# COMPANY E-MAIL USE FOR UNION ORGANIZING



## PURPLE COMMUNICATIONS, INC. AND COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

- 2007 *Register Guard* decision overturned on two (2) concrete grounds:
  1. Too much weight to employer property interest not enough weight to employees Section 7 rights
  2. Register Guard inappropriately analogized company emails to other employer owned equipment

# OFF-DUTY ACCESS



## PRE-2015 NLRB CASE DEVELOPMENT

- In *Sodexo America LLC (2012)* NLRB found employer violated Section 8(a)(1) of the NLRA because it maintained and enforced an illegal off-duty access policy pursuant to the *Tri-County Medical Center* standard.



# OFF-DUTY ACCESS



## TRI-COUNTY MEDICAL CENTER OFF-DUTY ACCESS STANDARD

- An off duty employee access policy will be upheld only if:
  1. Limits access solely with respect to the interior of the facility and other working areas
  2. Is clearly disseminated to all employees and
  3. Applies to off duty employees seeking access to the facility for any purpose and not just to those engaging in union activity

# OFF-DUTY ACCESS



## 2015 NLRB CASE DEVELOPMENT

- In *Marina Del Ray Hospital* (2015) the NLRB upheld the employers off-duty access policy as lawful on its face, but concluded that the employer applied the policy in a discriminatory manner by *permitting social events while barring meeting with union representatives*.

# SOCIAL MEDIA POLICIES & CASES



## TRIPLE PLAY SPORTS BAR & GRILLE (AUG. 22, 2014)

- Employer violated the NLRA when it terminated two (2) employees for participating in a Facebook discussion criticizing the employer's failure to withhold the proper amount of state income tax from their paychecks

# SOCIAL MEDIA POLICIES & CASES



## *Hoot Winc, LLC (MAY 19, 2014)*

- ALJ determined that company that provided restaurant services violated the NLRA because it terminated a server when the server posted disparaging comments about co-workers and manager on social media in violation of an “insubordination rule” in the employee handbook.
- ALJ explained that the rule was subjective and did not clearly define “insubordination” among other terms in its handbook.

NLRB Affirmed ALJ  
Sept. 1 2015

# SOCIAL MEDIA POLICIES & CASES



## LILY TRANSP. CORP., (APRIL 22, 2014)

- ALJ found that an “information posting” rule pursuant to the employee handbook, which was intended to protect the employer’s public image, was unlawful because it was not restricted to confidential or company information.

NLRB Affirmed ALJ  
March 30 2015

# SOCIAL MEDIA POLICIES & CASES



## LANDRY'S INC., (JUNE 26, 2014)

- ALJ did not find a NLRA violation when employer implemented a policy stating that “the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business.”
- The policy did not explicitly prohibit employees from posting.

NLRB Affirmed ALJ  
April 16, 2015

# SOCIAL MEDIA POLICIES & CASES



## 2015 DEVELOPMENT

### PIER SIXTY, LLC, (MARCH 31, 2015)

- The NLRB upheld an ALJ's decision that a catering company in NYC violated Sections 8(a)(1) and (3) of the NLRA when it terminated an employee for profanely attacking and insulting a supervisor in a Facebook post two (2) days before a union certification election.

# UNION DUES



## SUPREME COURT OF THE UNITED STATES

### *Freidrichs v. California Teachers Association*

- Court is currently reviewing the constitutionality of an “agency shop” arrangement.
- Under this arrangement, once a majority of workers have voted for union representation, the union can collect dues from all employees covered by their contract, regardless of whether they join the union.



**NLRB'S EXPANSION OF  
THE "JOINT-EMPLOYER"  
STATUS**

# ***BROWNING-FERRIS INDUSTRIES***



## **CREATED NEW STANDARD**

- The previous standard to determine “joint employer” was pursuant to a *direct control* test.
- The Browning-Ferris Industries’ decision abrogated the direct control test and issued a new test as to whether the purported joint-employer *possesses* the authority to control the terms and conditions of employment.

**MICRO UNITS**  
**&**  
**THE MACY'S DECISION**

# *MACY'S INC.*, (JULY 22, 2014)



- The NLRB held that a unit of forty-one (41) cosmetic & fragrance sales workers at a store in Saugus, Massachusetts, was appropriate for bargaining under the Boards 2011 *Specialty Healthcare* Decision.

**PUBLIC EMPLOYEES  
RELATIONS COMMISSION  
(PERC) CASE DEVELOPMENT**

# UFF v. Seminole State College



- PERC found that State College employer did not violate § 447.501(1)(a) and (c) by unilaterally altering its past practice of providing faculty members with step increases at the beginning of a certain academic year.

# Arciola v. Lee County Mosquito



- PERC dismissed a veteran's preference complaint. It rejected individual complainants' contention that the county employer violated his veteran preference rights by failing to hire him for the position of a senior accountant. Employer selected a more qualified job applicant for the position in question.

# Castellon v. Orlando Utilities Commission



- PERC dismissed a veteran's preference complaint, despite a complainant's contention that a utilities commission improperly refused to interview her or hire her for a certain specialist's position. PERC agreed with the hearing officer's conclusion that the complainant lacked the minimum requirements of the specialist position, even though she maintained valuable human resources, skills and experience.



# Dade County Police Benevolent v. Miami Dade County Board of County Commissioners



- Police Union appealed from a PERC order concluding that the county did not commit an unfair labor practice when its Mayor vetoed County Commission's resolution of a collective bargaining agreement impasse. Florida's First District Court of Appeal held that the Mayor veto constituted an unfair labor practice by the County.

# UFF v. Palm Beach State College BOT



- PERC dismissed a Union's unfair labor practice charge, despite the Union's contention that the state college employer unilaterally changed the eligibility requirements for continuing contract for bargaining unit employees. PERC decided that the Union clearly and unmistakably waived its right to bargain over those eligibility requirements by agreeing to certain contract terms.

**THE DEPARTMENT OF LABOR'S  
CHANGES TO THE PERSUADER  
RULE**

# The Persuader Rule



- In March 2016, the DOL issued regulations
- The DOL's new Persuader Rule changed the nature of reportable persuader activity and non-reportable advice in a fundamental way

# The Previous Persuader Rule



- Under the previous Persuader Rule, reporting was only required when an advisor made direct contact with employees.

# The New Persuader Rule



- Under the new Persuader Rule, however, any advice designed to persuade employees about union organization or collective bargaining, whether through direct *or indirect means*, is reportable by employers and their counsel.

# Current Status of the Persuader Rule



- In early July 2016, a federal court in Texas entered a preliminary, nationwide injunction preventing the DOL from enforcing the new Persuader Rule.
- On November 16, 2016, the same federal court converted that preliminary injunction into a permanent injunction with nationwide effect, preventing the DOL from enforcing its new Persuader Rule going forward.
- The grounds for the permanent injunction were the same as those given for the preliminary injunction: (1) the rule frustrated the attorney-client privilege; (2) the rule violated free speech and association rights guaranteed by the First Amendment to the U.S. Constitution; (3) the new Persuader Rule was unconstitutionally vague; (4) the new Persuader Rule was invalid because the DOL improperly calculated the costs of the regulation and did not make an appropriate cost-benefit analysis; and (5) the DOL lacked statutory authority to enforce the new Persuader Rule.

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