EMPLOYMENT LAW UPDATE – APRIL 19, 2016

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Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

TOPICS TO BE COVERED

- **Fair Labor Standards Act Update**
    - Proposed Amendments to the Salary Threshold
    - Independent Contractors Guidance
    - Minimizing Wage and Hour Exposure from Digital Devices and Working at Home
- **Civil Rights Laws Update**
    - Civil Rights Trends: Transgender Cases and Beyond
    - EEOC Position Statements
- **Intersection of Family Medical Leave Act and Americans with Disabilities Act**
    - Common Trends and Issues
    - Best Practices
- **Potpourri**

NEW RULE ON WHITE- COLLAR EXEMPTIONS

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FAIR LABOR STANDARDS ACT (FLSA)

General Rules

1. Employers must pay a statutory minimum hourly wage

2. Employers must pay employees overtime at the rate of one and one-half (1½) times the "regular rate" of pay for each "hour worked" in excess of forty (40) hours in a seven-day workweek

3. Employers must keep track of the hours worked by employees in a workweek

4. Employees may be exempt from the minimum wage or overtime pay provisions or both

WAGE AND HOUR LAW: WHITE-COLLAR REGULATIONS

- Current regulations require overtime for employees earning less than $455/week ($23,660/year)

  Biweekly: $910.00

  Semimonthly: $985.83

  Monthly: $1,971.66

WHAT EMPLOYERS NEED TO KNOW

- Regulations will increase the number of employees nationwide who will qualify for overtime
- The proposed rule containing changes was published on July 6, 2015
- The 60-day notice and comment period ended on September 4, 2015
- The DOL expects final regulations to take effect in July 2016
- The DOL will provide for an implementation period, but not expected to be long

WAGE AND HOUR LAW: WHITE-COLLAR CHANGES

- The proposed Regulations will automatically increase how the salary level is set from the current level (required overtime for employees earning less than $455/week ($23,660/year)) to an amount that is equal to the 40th percentile to weekly earnings for full-time salaried workers

- Proposed Regulations will require overtime for employees earning less than $910.00/week ($50,440/year)

  Biweekly: $1,820.00

  Semimonthly: $2,101.67

  Monthly: $4,203.33

WAGE AND HOUR LAW: WHITE-COLLAR CHANGES

- Current “Highly Paid Employees” Salary
  - Separate test for those earning more than $100,000/year who may still be entitled to overtime
  - Employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

WAGE AND HOUR LAW: WHITE-COLLAR CHANGES

- Proposed “Highly Paid Employees” Salary
  - Proposed Regulations will set the “Highly Paid Employee” annual salary at the 90th percentile of earnings for full-time salaried workers, or an estimated $122,148/year (currently $100,000/year)
  - Proposed Regulations retain the requirement that employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

WHAT EMPLOYERS NEED TO KNOW

Best Practices

- Don’t delay
- Reevaluate non-exempt employees (duties, salary)
- Determine cost/benefit analysis of overtime v. exempt status
- Analyze all job classifications and actual duties performed for FLSA liability
- Consult with an attorney

EMPLOYEES V. INDEPENDENT CONTRACTORS

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INDEPENDENT CONTRACTORS

ABC Construction is in the business of framing residential homes.

ABC Construction hires a Carpenter to frame residential homes. The Carpenter's primary job responsibility is to frame houses.

ABC Construction hires a Software Developer to create software among other job duties, including assisting the company in tracking its bids, scheduling projects and crews, and tracking material orders.

At the end of the year, ABC Construction issues both the Carpenter and the Software Developer 1099s.

IS ABC IN VIOLATION OF THE FLSA?

A. Yes, Carpenters are integral to the employer's business because ABC is in business to frame homes; therefore, the Carpenter is an employee, not an independent contractor.
B. Yes, both the Carpenter and the Software Developer are integral to ABC's business and are employees, not independent contractors.
C. No, because ABC provides 1099s to each employee.
D. No, because neither employee exercises managerial discretion; thus, ABC can designate them as independent contractors.

INDEPENDENT CONTACTOR MISCLASSIFICATIONS

- On July 15, 2015, at the request of interested employers, the Administrator of the Labor Department's Wage and Hour Division published a 15-page memorandum of guidance addressing the proper classification of workers. The memo can be found on the DOL's website: www.dol.gov
- The memorandum clarified that, under the Fair Labor Standards Act, the definition of employee is much broader than what some employers believe and what some court rulings have determined
  - Practical Implication: Implementation of the DOL's guidance will make it much more difficult for employers to classify workers as independent contractors
- In FY 2015, DOL investigations into employee misclassifications resulted in $74 million in back wages

INDEPENDENT CONTRACTORS VERSUS EMPLOYEES

	EMPLOYEES	INDEPENDENT CONTRACTORS
Covered by labor and employment statues	Yes	No
Covered by worker's compensation laws	Yes	No
Eligible for unemployment insurance benefits from employer's account	Yes	No
Employers must withhold income tax, FICA/MEDICARE tax	Yes	No
Employers must withhold unemployment tax	Yes	No

HOW IS AN INDEPENDENT CONTRACTOR STATUS DETERMINED?

- Simply designating or calling a worker an independent contractor is not sufficient
- Simply requiring a worker to sign an independent contactor agreement is not sufficient
- Industry custom or practice is irrelevant

ECONOMIC REALITIES TEST

- Is the Work an Integral Part of the Employer's Business?
    - Looks to whether the work to be performed by the worker is integrated into the main flow or purpose of the work done at the business.

- Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
    - Looks to whether the worker has the benefit of profit or risk of losing money on the agreed-upon project.

ECONOMIC REALITIES TEST CONT.

- How Does the Worker's Investment Compare to the Employer's Investment?
  - Based upon whether the worker makes a significant investment in establishing his or her own business by purchasing tools, materials, equipment, or facilities. The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent business.

- Is the Relationship between the Worker and the Employer Permanent or Indefinite?
  - Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee.

ECONOMIC REALITIES TEST CONT.

- Does the Work Performed Require Special Skill and Initiative?
  - A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. That a worker is skilled is not itself indicative of independent contractor status.

- What is the Nature and Degree of the Employer's Control?
  - The employer's control should be analyzed in light of the ultimate determination whether the worker is economically dependent on the employer or truly an independent businessperson. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. But an employer's lack of control over workers is not particularly telling if the workers work from home or offsite.

I/C – COMMON SENSE RULES

- Am I paying a company? (individual more likely to be an employee)
- Does the contractor choose the workers it sends? (If you're hiring a company, you're buying results, not particular workers)
- Does the person offer services to the public? (If person works only for you, more likely employee)
- Is the person working FOR (not in) the business? (Washing your windows vs. making/selling your widgets)
- Am I paying a monthly invoice amount? (Paying hourly / commission, more likely to be an employee)

If you answered "NO" to any of these questions, you're in the gray zone

WHAT EMPLOYERS NEED TO KNOW

Employers should:

- Make clear which department within the organization is responsible to understand the law before hiring independent contractors
- Maintain basic records on the independent contractor determination process, and the facts used to make that determination
- Carefully review type and scope of work to be performed before engaging the services of any non-employee
- Contract to avoid potential employer liability by:
  - Obtaining appropriate indemnification provisions to protect the company from the wage and hour claims of the service provider's workers
  - Avoiding giving contractors rights or access that cut against the independent contractor

Minimizing Wage and Hour Exposure from Digital Devices and Working at Home

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NONEXEMPT EMPLOYEE WORK FROM HOME HYPO

Eastern Airlines recently decided to allow its customer service representatives (paid a $21,000/yr salary) to work from home by forwarding customer calls to the employees' landline or cell phone and providing them an Eastern laptop. In the past, Eastern strictly enforced its no overtime policy by locking representatives out of their computers and disabling their phones at the end of their shifts; re-activating them at the start of their shifts the next workday. Additionally, Eastern would require employees to go to the lunchroom to take their 30-minute unpaid lunch. Stacy, an Eastern representative, decided to take advantage of the work from home offering. Stacy was scheduled to work from 8:30 AM-5:00 PM Monday-Friday. Over the next few weeks Stacy worked her normal schedule, but at least three times a week Stacy would have to work through lunch (Stacy would mute her phone and take bites of her lunch while the customer spoke) due to heavy call volume. During that same time, Eastern locked Stacy out of the network and stopped forwarding calls to her at the end of her shift.

NONEXEMPT EMPLOYEE WORK FROM HOME HYPO

Does Eastern owe Stacy overtime pay when she worked from home?

A. No, because Stacy was a salaried employee

B. No, because Eastern enforced its no overtime policy by only allowing Stacy to receive customer calls and e-mails during her regularly scheduled work hours

C. Yes, because Stacy worked through lunch

LIVING IN THE “I WANT IT NOW” TECHNOLOGY ERA

Smart phones and tablets are extremely handy. No question they can increase an employee’s productivity. BUT if your non-exempt employees are using them after work hours, you could be facing legal consequences.

COMMON SCENARIO

The Chicago Police Department issued company-provided cell phones. As with other employers in the “I want it NOW” era, management saw this as a way to boost employee productivity by being able to check their e-mail, voice mail and text messages remotely. Good idea in theory. BUT officers used their devices for work-related tasks after their shifts had ended.

RESULT? A Sgt. Filed a Fair Labor Standards Act collective action against the Police Department claiming that the department willfully violated the statute by intentionally failing and refusing to pay plaintiff and the collective all compensation due under the FLSA. Put simply, the officers wanted overtime for the work they did after hours on their employer-provided smart phones.

"WORK" ACTUALLY PERFORMED

- Employees are only entitled to compensation under the FLSA for "work"
- The FLSA does not define "work," but Supreme Court has held that "work" under the FLSA means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and *pursued necessarily and primarily for the benefit of the employer and his business*"
- The "necessarily and primarily" aspect is the most litigated as the "exertion" aspect is easily satisfied (e.g., a security guard watching monitors requires mental exertion)
- Time spent waiting to work is, at times, considered working time under the FLSA where the employee is "engaged to wait" or is "waiting to be engaged"

“HOURS WORKED” GENERALLY

- “Hours worked” has been generally understood to include:
  - Time an employee must be on duty, on the employer’s premises or at any other prescribed place of work; and
  - Any additional time the employee is **allowed** (i.e., **suffered** or **permitted**) to work (even if not requested by the employer)

“OFF THE CLOCK WORK” GENERAL RULE

- Whether an employer must compensate employees for work performed outside of regular working hours and outside of the office (hereafter “off the clock” work) is a very fact intensive inquiry

- However, the case law generally requires an employer pay an employee for time “off the clock” if:

  1. The employee **performed “work”**;

  2. For more than a ***de minimis*** **amount of time**; and

  3. The employer **knew or had reason to know** about the work

EMPLOYER KNEW OR HAD REASON TO KNOW

- Employers (through their managers) who know or have reason to know of off-the-clock work must compensate the employee for the time spent
  - Employer cannot avoid liability by deliberately disregarding indications employees are working off the clock
- Common sense standard, which is met under myriad of circumstances:
  - Employer's high performance expectations unattainable during regular work hours
  - Employer accepts "off-the-clock" work (e.g., a report e-mailed after hours)

EXEMPT EMPLOYEE ON FMLA LEAVE HYPO

Eastern Airlines has over 1,000 employees in its Detroit, MI office, including its Director of Governmental Compliance, Ron (paid $95,000/yr salary). Eastern has an unpaid paternity leave policy (FMLA) requiring any paid leave be used before using unpaid paternity leave. Ron's wife recently gave birth to triplets, which required Ron to take 10 weeks of leave. Ron used all of his paid leave to cover the first five (5) weeks and then used unpaid paternity to cover the rest. While on unpaid leave, Ron received numerous calls (roughly 40 minutes/day) from Eastern Airlines officials asking how to adjust to a new batch of Environmental Protection Agency regulations.

EXEMPT EMPLOYEE ON FMLA LEAVE HYPO

Is Eastern liable for its actions during Ron's unpaid leave?

A. No, because Ron is an FLSA exempt employee

B. Yes, because Ron was not paid for work (e.g., 40 minute phone calls) performed while on unpaid paternity leave, Eastern may be liable for FMLA interference claim

C. Maybe, depending on the particular facts of the phone call

WHAT EMPLOYERS SHOULD KNOW

- Employers must pay nonexempt employees for all hours worked, even unauthorized overtime
- Employers should define standards about when and under what conditions work is permitted away from the workplace
  - For example, are employees permitted to remotely access the computer system? Are employees permitted to check e-mails at night?
- Employers should ensure that nonexempt employees accurately and completely record all hours worked
- Employers may (and should) discipline employees for unauthorized working time
- Be mindful of Employee use of smartphones and other technology from home and outside scheduled work hours

EEOC UPDATE

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EEOC (TITLE VII, ADEA, ADA)

- Technology
- Litigation increase
- Gender identity / LGBT
- Pregnancy

EEOC – TECHNOLOGY

- 2015: Respondent Portal
- 2016: Claimant Portal (not yet out)

EEOC – LITIGATION

- 2015 - 142 merits lawsuits
- Individual vs. Systemic
  - 100 individual
  - 15 systemic
  - 26 non-systemic, multiple claimants
- Types of discrimination
  - 83 Title VII
  - 53 ADA
  - 14 ADEA
  - 7 EPA
  - 1 GINA

NEW POSITION STATEMENTS DISCLOSURE

- January 1, 2016: EEOC announces it will disclose position statements and exhibits to Charging Party
- Trade secrets or confidential information must be labeled as such and separated
- Confidential attachments can include:
    - Medical information (except the charging party's);
    - Social security numbers;
    - Confidential commercial or financial information;
    - Trade secrets;
    - Irrelevant personally identifiable information of witnesses, comparators, or other nonparties; and,
    - Any references to charges filed against that employer by other charging parties.

RELIGIOUS ACCOMMODATIONS

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IMAGE / RELIGIOUS ACCOMMODATION

Fatima is Muslim and wears a headscarf in accordance with her religious beliefs. She applies for a sales position at a national clothing store that carries fashions for teens. Based on its marketing strategy, C & H requires its sales employees to wear only clothing sold in its stores, nothing in the color black and no headgear. C & H does this so employees will look like the models in its catalogues and promote its brand.

Fatima never tells C & H she wears the scarf because of her beliefs and never asks for an accommodation. C & H believes Fatima wears her headscarf for religious reasons, but does not hire her because it does not want to make any exceptions.

WAS C & H WRONG IN FAILING TO HIRE FATIMA?

1. No. C & H did not know for certain if Fatima wore her headscarf for religious reasons and Fatima did ask for an accommodation.
2. Yes. C & H was obligated to ask Fatima about her headscarf because she wore it at the interview.
3. Yes. Once C & H suspected Fatima wore her headscarf for religious reasons, it was required to make an exception for her as a religious accommodation in the absence of undue hardship.
4. Yes, because of (2.) and (3.) above.

TRANSGENDER EMPLOYEES

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GENDER DISCRIMINATION

Aimee (formerly Anthony) was employed by C & H as a funeral director for six years. C & H's dress code distinguished between what male and female funeral directors must wear and required men to wear suites and ties. Aimee informed C & H and her co-workers, in writing, that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire as a woman at work. Aimee explained she had a gender identity disorder and intended to live and work full time as a woman. Fifteen days later the owner of C & H terminated Aimee, telling her that what she was "proposing to do" was unacceptable. All of the documentation in C & H's possession identified Aimee (or Anthony) as a male. When terminated, Aimee was also married to a woman.

WAS AIMEE'S TERMINATION PERMISSIBLE?

1. Yes. Like sexual orientation, transgender status is not a protected status under federal law (Title VII).
2. No. Aimee's transgender status is irrelevant to the availability of protection under federal law (Title VII).
3. Yes. By dressing as a woman at work, when Aimee was biologically and legally still a man, she violated C & H's dress code.
4. No. Aimee was terminated for failing to conform to sex- or gender-based preferences, expectations or stereotypes and C & H violated federal law (Title VII).

EEOC: GENDER IDENTITY

- On April 9, 2015 the EEOC reached a settlement with Lakeland Eye Clinic in Tampa, FL in one of the first ever transgender discrimination lawsuits filed by the EEOC

- The EEOC is still pursuing other gender identity discrimination claims as part of its newest efforts in implementing its 2012 Strategic Enforcement Plan (SEP), and intending to prioritize enforcement of Title VII gender discrimination provisions for LGBT individuals

- Title VII suits focus upon theories of sex discrimination, including that based upon gender stereotyping

- Presently there is no federal law that specifically classifies gender identity as a protected status.

- A number of states, including NJ and DE as well as some municipalities prohibit discrimination against transgender people

PREGNANCY IN THE WORKPLACE

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PREGNANCY / LIGHT DUTY

Peggy is a driver. Her job responsibilities include the pickup and delivery of packages. C & H requires drivers to lift, push, pull, and otherwise manipulate packages weighing up to 70 lbs., and to assist in moving packages up to 150 lbs. Peggy became pregnant and her doctor imposed lifting restrictions. Peggy could not lift more than 20 lbs. during the first twenty weeks of her pregnancy or more than 10 lbs. for the balance of her pregnancy.

In the CBA, C & H's light duty policy reflects it will accommodate employees injured on the job, those with a disability under the ADA, and those who lost their DOT certifications. Peggy was told she could not return to work because she could not satisfy the lifting requirement. When she asked C & H to accommodate her disability, she was told she was "'too much of a liability'" and could not return until she was no longer pregnant.

WAS C & H REQUIRED TO OFFER PEGGY LIGHT DUTY WORK?

1. No. Peggy's lifting restrictions were temporary and not a disability under the ADA.
2. No. C & H had a neutral light duty policy which did not extend to pregnant employees.
3. No, because of (1.) and (2.) above.
4. Yes, if Peggy can show C & H accommodates most non-pregnant employees while failing to accommodate pregnant employees, significantly burdening pregnant workers.

EEOC – PREGNANCY

- Pregnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

- The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII of the Civil Rights Act of 1964 to make employment discrimination on the basis of pregnancy, childbirth or related medical conditions constitute sex discrimination under Title VII.

  - *Practical Implication:* (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment

- State Level protections are also in place regarding pregnancy discrimination

EEOC – PREGNANCY

- *Young v. UPS*
  - Pregnant delivery person
  - Policy provided light duty to worker's comp, ADA, and DOT suspensions
  - Held: Should have allowed her light duty unless significant burden
- June 2015: Enforcement Guidance on Pregnancy Discrimination and Related Issues Highlights
  - Cannot discriminate
  - Cannot subject to increased scrutiny and harsher discipline
  - Cannot force person to take leave
  - Protected status includes was pregnant / might get pregnant / fertility treatments / abortion
  - Lactation / breast feeding

PREGNANCY/ ACCOMMODATIONS

Belle, your employee, is pregnant. She has had some complications and is temporarily suffering from gestational diabetes because of her pregnancy. One of the symptoms of gestational diabetes is nausea and vomiting. Belle has been late for work three times because of these symptoms. Belle told her supervisor about her condition, and asked if she could work from home on the days she becomes sick. While inconvenient, most of Belle's work could be performed at home.

Belle's supervisor believes Belle is using her pregnancy as an excuse to come in late and get out of work. As a result, he refuses to accommodate her and writes her up every time she is late and uses gestational diabetes as her excuse.

When the HR Director reviews Belle's file during her annual review, she is terminated for violating facility policy regarding excessive tardiness. The HR Director is aware that the facility has terminated other employees for similar issues.

DID THE EMPLOYER VIOLATE THE FMLA AND/OR ADA?

1. No. Because the ultimate decision to terminate Belle came from the HR Director, who properly based the decision on information in Belle's personnel file which was unrelated to any disability.

2. Yes. Because the supervisor failed to accommodate Belle and wrote her up for being tardy.

3. No. Because Belle's requested accommodation was unreasonable.

4. Yes. Because the complications from her pregnancy qualify as a serious health condition under the FMLA.

5. Both 2 & 4.

COMMON FMLA AND ADA TRAPS

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FMLA / ADA

Alice has been out for twelve weeks on FMLA leave. She is claiming that her supervisor's style has caused her severe depression. The doctor has moved her return to work date back. Alice has been a poor employee since the facility hired her. She complains about everything and claims that her supervisor harasses her. When asked what form the harassment takes, she says he yells at everyone, including a number of male employees. She admits that none of her supervisor's behavior is sexual in nature.

The facility just received a slip from her doctor saying that he is putting her on indefinite leave and suggesting you discharge or discipline the supervisor. The slip states that the supervisor is adding to Alice's fragile mental state. Her supervisor is fed up with Alice and wants to fire her.

WHAT SHOULD THE EMPLOYER DO?

1. If she cannot return to work at the end of her leave, you can automatically terminate her.
2. Seek to accommodate her by transferring her to another position.
3. Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.
4. You cannot discharge her because her complaint of harassment is protected activity under Title VII, and she will have a retaliation claim against the employer.

FMLA

Ariel works Monday through Friday for an insurance company.

Ariel has intermittent FMLA for migraines. The certification covers a five-month period. In the past three months, Ariel had seven FMLA occurrences. Three of her occurrences fell on a Monday. Two coincided with a scheduled day off. The facility suspects Ariel is abusing her FMLA. Additionally, her co-workers are becoming increasingly tired of "covering" for Ariel when she is out of the office. Ariel calls in on the following Monday, stating that she has a migraine and needs to use FMLA leave.

WHAT SHOULD THE EMPLOYER DO?

1. Require Ariel to complete recertification but do not deny her leave while waiting for the recertification.
2. Require Ariel to complete recertification and deny her leave while waiting for the recertification.
3. Ariel has a valid FMLA leave. The employer cannot take any action without violating the law.
4. The employer should terminate Ariel for FMLA fraud.

FMLA

Daisy has been your Business Office Manager for about a year.

She went out on FMLA maternity leave. While on leave, a retired Office Manager filled in for Daisy. The temporary manager discovered a variety of problems, including bills that were unpaid, unopened mail, and overdue reports. The temp also receives a litany of complaints from Daisy's subordinates, describing her as a bully, engaging in favoritism and "harassing" them.

Daisy's boss wants to terminate her when she returns from her leave.

WHAT SHOULD THE EMPLOYER DO?

1. Terminate, because any other employee would be terminated for these things.
2. Reinstate her, but put her on a last chance agreement and get her a job coach.
3. Reinstate her without discipline because she has the right to be reinstated to her position.

POTPOURRI

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COMPANY EMAIL SYSTEM

Acme provides its employees with a work email account. The company's electronic communications policy prohibits employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company" and sending "uninvited email of a personal nature." The company permits limited personal use of the company e-mail by employees.

A union files a representation petition. Several employees send uninvited e-mails to co-workers urging them to vote for the union. They also send e-mails informing employees of the time and place of union meetings. When Acme learns of the emails, it disciplines the employees who sent the emails for violating the company's electronic communications policy. After the union loses the election, it files an unfair labor practice charge with the NLRB alleging that Acme's electronic communications policy violated the NLRA.

DID THE COMPANY ACT IMPERMISSIBLY?

1. No, the company owns its e-mail system and can prohibit the employees using it for any purpose, including union purposes.
2. No, because the company had a policy which was clearly communicated to its employees.
3. No, the union lost the election so federal labor laws do not apply.
4. Yes, employees who have the right to use their employer's e-mail system in course of their work have right to use e-mail system to communicate about the union during non-work time.

NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

On March 18, 2015, NLRB General Counsel Richard Griffin, Jr. issued Memo GC 15-04, intending to bring some clarity to the NLRB's sweeping enforcement against employee handbook policies his office has deemed to be overly broad and infringing on workers' section 7 rights. GC Griffin identified eight categories of rules that have frequently come before the Board, and provides examples of lawful and unlawful wording:

- Confidentiality Policies
- Employee-Management Conduct Policies
- Employee-Employee Conduct Policies
- Employee Interaction with Third-Party Policies
- Policies on the use of Company Logos, Copyrights and Trademarks
- Policies that Limit Photography and Recording
- Policies that Restrict Employees from Leaving Work
- Conflict of Interest Policies

NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

Take-A-Ways:

- Guidance affects not only union but also non-union employers
- Employers should compare their handbook policies to those addressed by the GC
- If any policies appear to be unlawful or questionable, contact labor and employment counsel to address the deficiencies and to prepare workable policies that are likely to survive GC's scrutiny

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THANK YOU

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