

# 2014 EMPLOYMENT ISSUES



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# NLRB



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## The National Labor Relations Board

- **Quasi-Judicial Agency in the Department of Labor**
  - **Regulates compliance with the National Labor Relations Act**
  - **Limited rule making authority**
  - **Reviews Administrative Law Judge's decisions**
  - **Political entity not bound by prior decisions**
- **Current Board consists of three pro-union and two management representatives.**
- **Richard Griffin, Jr. was sworn in as the Board's General Counsel on November 4, 2013.**

# Protected Employee Rights



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## **My Workforce Is Not Unionized, Why Should I Care What The NLRB Has To Say?**

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- **Whether your workforce is represented by a union or not, most private employers are covered by the National Labor Relations Act (NLRA).**
- **Excluded entities: Federal or State offices, the Federal Reserve Bank, and employers subject to the Railway Labor Act, a municipality or religious organization.**

## Understanding Employee Rights Under The National Labor Relations Act

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Section 7 – “Employees shall have the right to 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. . . .**” (Emphasis Added)

## Conduct Must Be Both Protected and Concerted

- Conduct must be protected by the NLRA
  - Right to Organize
  - Statements or activity regarding an employee's wages, working conditions or other terms of employment
- Conduct must involve concerted activity
  - Concerted activity occurs when “the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself;” or
  - “Where individual employees seek to initiate or to induce or to prepare for group action.”

## The NLRB's Position On Social Media

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- **The Board is broadly interpreting protected/concerted activity.**
- **The Board has extended an employee's Section 7 rights to a broad range of social media activity.**
- **Blanket social media policies that prohibit the exercise of Section 7 rights are unlawful.**
- **Employee terminations that prohibit the exercise of an employee's Section 7 rights are unlawful.**
- **The Board may find unlawful any policy that even "touches" on Section 7 rights.**

## Discipline/Termination Considerations

- **Carefully review any discipline that arises out of social media postings.**
- **Consider the following:**
  - **Is the employee's social media posting suggestive of collective action by employees?**
  - **Does the posting reference a prior discussion among employees?**
  - **Did other employees respond to the posting?**
  - **Did the response reference working conditions?**
  - **Is the employee's gripe personal?**
- **Train supervisors on improper social media postings and proper steps in disciplining employees.**

## Internal Employer Investigations

- **Board recently limited employer's rule that employees keep information about investigations confidential. The Board held that the employer's rule violated the Act by establishing blanket workplace investigation procedures, policies, or forms that attempt to prohibit employees from discussing investigations with co-workers.**
- **The Board reversed 34 years of precedent and announced that an employer is now required to provide a union representing employees with witness statements obtained during investigative interview.**
- **We expect that the Board will require non-union employers to allow an employee a representative during investigations which may lead to discipline.**

## Arbitration Agreements

- **The US Supreme Court has held that the Federal Arbitration Act requires Courts to enforce commercial arbitration agreements that waive the plaintiff's right to file a class action in a court or as part of the arbitration proceeding. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010).**
- **In *D.R. Horton*, 357 NLRB No. 184 (2012), the NLRB held that an arbitration agreement which requires employees to arbitrate a Fair Labor Standards Act claim against the employer and prevents employees from bringing both class action lawsuits and class action arbitrations violated Section 7 of the Act.**
- **The 8th Circuit Court of Appeals has rejected the Board's ruling on class actions. *Owen v. Bristol Care Inc.*, 702 F.3d 1050 (8th Cir, 2013).**

## The Board's Notice Posting Regulations

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- **Traditionally the Board does not interpret the National Labor Relations Act through regulations.**
- **Employee Rights Poster Requirements**
- **Unless the employer has a contract with the U.S. Government, it does not have to post the Notice of Rights Poster.**

# Union Organizing And Union Rights



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## NLRB Election Rules

- **Purpose is to cut the time it takes to hold a union representation election.**
- **New Rules:**
  - **Limits pre-election hearings**
  - **Limits post-hearing briefs**
  - **Limits right to appeal Regional Director's decision to the full Board**
  - **Makes Board review of post election objections discretionary**
  - **Discontinues Board 25 day election rule**
- **US DC Circuit has held that the Board that enacted new regulations did not have a quorum.**
- **If new Board is appointed, it could vote on the rules.**

## Micro Units

- In *Park Manor*, the Board held that it would use a broader approach in non-acute care facilities to determine the proper bargaining unit.
- In *Specialty Health Care*, the Board rejected the *Park Manor* standard and adopted the “community of interest” standard when determining the proper unit for bargaining. The Board certified a micro unit consisting of a small group of employees.
- Since *Specialty Health Care*, the Board has permitted micro units in:
  - Construction cases
  - Nuclear power plants

## Expansion of Union Rights

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- **Employers are now required to continue to collect union dues while bargaining a new collective bargaining agreement unless the parties have reached impasse or agreement.**
- **Employer must bargain over the discipline of an employee with a newly recognized union even if the parties do not have a collective bargaining agreement.**
- **Union members who object to union lobbying efforts must still pay portion of dues for lobbying to the union if the lobbying is germane to collective bargaining, contract administration or grievance adjustments.**

## Michigan Right -To-Work Law

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- **As of March 28, 2013, employer and union cannot enter into a collective bargaining agreement with a union security clause that requires the discipline or discharge of an employee for failure to pay union dues.**
- **Employer is required to continue to enforce a union security clause if the collective bargaining agreement has a union security clause and the collective bargaining agreement expires after March 28, 2013.**
- **Violation of the act could lead to criminal and civil liability.**

# EEOC ISSUES



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## EEOC 2013-2016 Strategic Plan

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- **Eliminate barriers in recruitment and hiring**
- **Emerging and developing issues**
- **Pay equity**
- **Preserving access to the legal system**
- **Preventing harassment by training and outreach**
- **Protecting immigrant, migrant and other vulnerable workers**

## EEOC Hot Button Issues

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- **The EEOC continues to attack employers' use of felony arrests and convictions and credit checks in hiring.**
- **Automatic termination of employees who are disabled without trying to accommodate the employee.**
- **Litigating more national origin claims with a focus on Hispanic and Middle Eastern and Muslim discrimination.**

## Recent Supreme Court Cases

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- ***University of Texas Southwestern Medical Center v. Nassar***, 136 S.Ct. 486 (2013), an employee alleging unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII) must prove that his or her protected activity was a but-for cause of the alleged adverse action by the employer. The Court's decision means that employees alleging retaliation have a higher causation standard than employees alleging status-based discrimination.
- In ***Vance v. Ball State University***, 133 S.Ct. 2434 (2013), the Court narrowly defined a "supervisor" as an employee who is empowered by the employer to take tangible employment actions against the victim of the harassment.

# DEPARTMENT OF LABOR



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## DOL Issues

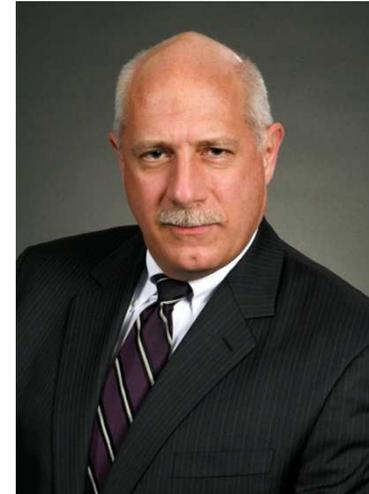
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- **Employees can have union representative at OSHA inspections**
- **Proposed public disclosure of OSHA 300 logs**
- **DOL approved new rules for warning signs on machinery and entrances which go into effect in 2014**
- **New OFCCP Rules for affirmative action plans for veterans and persons with disabilities.**
- **Wage and Hour Division and IRS continue to challenge misclassification of employees as exempt from the FLSA.**

## Thank You



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**Note: 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.**