

# HOT-BUTTON LABOR ISSUES IN THE CURRENT POLITICAL CLIMATE

*APPA LEGAL & REGULATORY CONFERENCE  
NEW ORLEANS - 10/9/2017*

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# AGENDA

- NLRB – Last 8 years
  - Rule Making
  - Case Law
- NLRB – Today
- NLRB – Next 2, 4, 8 Years
- What can Employers Do?

# NLRB DECISION-MAKING AND RULE-MAKING OVER THE PAST 8 YEARS

- NLRB Rule Making
  - Fast Track Elections
  - Disclosure of Employee Contact Information
- NLRB Decisions
  - Use of Employer Email
  - Invalidating Common Handbook Rules
  - Joint Employer Doctrine
  - Micro Units
  - Temp Workers

# UNION ORGANIZING

- THE WAY IT USED TO BE

# FAST TRACK ELECTIONS

- April 2015 Rule effective date
- Elections occur between 14-25 days after filing of petition
- Employers must provide voter's *personal* email addresses and telephone numbers (along with names and addresses)
- Limited ability to challenge issues at pre-election hearing

# FAST TRACK IN PRACTICE

- Extremely short-time frame
  - Average time from petition election under new rule: ~**21 days**.
  - Average under the old rule was 38 days.
- Disclosure of personal contact information
- Difficult to pull together evidence for a hearing/brief in less than one week

# FAST TRACK IN PRACTICE

- Need proactive approach
- CPR
- Empower managers to know how the process works, what they can and cannot say
  - T.I.P.S.
  - F.O.R.E.

# Key Obama-Era NLRA Decisions



# MICRO-UNITS

- Leading Case: *Specialty Healthcare*, 357 NLRB No. 83 (2011)
  - If defined unit is “appropriate,” employer must show “overwhelming community of interest” with other employees to add them to group
- *Macy’s* (5<sup>th</sup> Cir. 2016)
- *Bergdorf Goodman*, 361 NLRB No. 11 (2014)
- *Rhino NW v. NLRB* (D.C. Cir. Aug. 2017)

# JOINT EMPLOYERS

## *Browning-Ferris* (2015)

- Creates *new* joint employer test
- No longer required to exercise direct and immediate control

# TEMPORARY EMPLOYEES

*Miller & Anderson, 364 NLRB No. 39 (2016)*

- **Old Rule:** Both primary/ “user” employer & staffing supplier required to consent before an election covering bargaining units of both temp & regular employees can be held.
- **New Rule:** Employers’ approval no longer required.

# ACCESS TO EMPLOYER EMAIL

## *Purple Communications (late 2014)*

- "Employee use of email for [union] communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

# ACCESS TO EMPLOYER EMAIL

## *Purple Communications, continued*

- Are your policies lawful?
- What are the exceptions?
- What are legitimate rules?
- Unlawful surveillance or lawful monitoring?

# SOCIAL MEDIA

- Employers must use caution when disciplining employees arising out of their use of social media:
  - Electronic postings can be considered to be co-worker discussions.
  - Electronic postings can be deemed to be outgrowths of concerted activity.
  - Electronic postings can be deemed to be calls to action.

# Most Recent Major Social Media Cases

- *NLRB v. Pier Sixty, LLC*, No. 15-1841 (2d Cir. April 21, 2017)
  - ◆ FB Post about manager during union campaign: “Nasty mother f\*\*cker!” “F\*\*\* his mother and his entire f\*\*\*ing family,” “Vote YES”

# Most Recent Major Social Media Cases

- *Chipotle*, 364 NLRB No. 72 (2016)
  - ◆ Employer's Social Media Policy prohibited:  
"posting incomplete, confidential or inaccurate information and making disparaging, false or misleading statements."
  - ◆ Twitter/FB Posts: "Nothing is free, only cheap#labor;" "Guac is extra not like #qdoba;" crews only make \$8.50



# SOCIAL MEDIA “SAFE HARBORS”

- Product and service disparagement
- Customer disparagement
- Malicious defamation
- Threats of violence
- Harassment
- Use of social media during work time

# CONFIDENTIALITY

*Banner Estrella Medical Center*, 358 NLRB  
No. 93 (2015)

- Blanket rule requiring confidentiality during internal investigations *per se* unlawful
- Need “specific legitimate” reason to keep confidential.

# CONFIDENTIALITY

## Overbroad Rule

- *“ dissemination of confidential information within [the company], such as **personal or financial information**, etc., will subject the responsible employee to disciplinary action or possible termination.”*

# ARBITRATION

## *D.R. Horton and Murphy Oil*

- NLRB has said, repeatedly, that “class action” arbitration waivers violate Section 7
- Circuit courts are split
- Supreme Court to decide case in fall of 2017/Spring of 2018
- Legislation?

# HANDBOOK RULES

## Common Handbook Rules Routinely Held to violate Section 7

- Unlawful if employees “could reasonably construe” provision to prohibit activities under § 7

# HANDBOOK RULES

“ Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.”

# HANDBOOK RULES

“Be respectful of others and the Company”

# HANDBOOK RULES

“Failure to report to your scheduled shift for more than three consecutive days without prior authorization or walking off the job during a scheduled shift” is prohibited.



# NLRB – NEXT 2, 4, 8 YEARS

- Composition of NLRB
- Legislation

# NLRB - TODAY

- Five person board
  - Three President's party
  - Two opposition party
  
- General Counsel

# NLRB - TODAY

## Two Trump appointments

- Marvin Kaplan
  - ◆ Confirmed August 2
  - ◆ Sworn in August 10
  
- William Emmanuel

# NLRB - TODAY

## New General Counsel

- Richard Griffin – term expires fall
  
- Peter Robb nominee

# NLRB - TODAY

- Realities of change
  - Freely overturn precedents
  - Need cases with fact patterns to it
- Budget cuts

# NLRB - FUTURE

- U.S. Supreme Court
- Legislation
- NLRB Rule Making

# WHAT CAN YOU DO?

- Understand and deal with current state of law
  - Review policies
  - Prepare – educate managers/supervisors

# WHAT CAN YOU DO?

Maintain Positive Employee Relations Strategy ("CPR")

C – Communications

P – Participation

R – Recognition



# WHAT CAN YOU DO?

- T.I.P.S.
- F.O.R.E.

# QUESTIONS?

# THANK YOU.

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