Monday, October 1, 2012
4:30 PM - 6:00 PM

503 – The "New" NLRB: Activist Board or Rogue Agency?

Sylvia Adams
Associate Chief Legal Officer
Adventist Health System

Stephanie Blackman
Vice President, General Counsel, & Secretary
Closure Systems International

Patrick McGlone
Senior Vice President, General Counsel
ULLICO Inc.

Kimberly Seten
Partner
Constangy, Brooks & Smith

Evan Turtz
Vice President and Deputy General Counsel-Labor and Employment
Ingersoll Rand

Faculty Biographies

Sylvia Adams

Sylvia R. Adams is an associate chief legal officer for labor and employment for Adventist Health System, a not-for-profit, faith-based healthcare organization with 55,000 employees located in 12 states. Adventist Health System is headquartered in Altamonte Springs, FL. Her responsibilities include providing legal counsel to the organization at a corporate and facility level, handling early stages of litigation, and managing outside counsel throughout the litigation process.

Prior to joining Adventist Health System, Ms. Adams was a partner with Kiesewetter Wise Kaplan Prather, PLC, a labor and employment boutique firm, located in Memphis, TN. While at Kiesewetter Wise, she represented management exclusively, providing advice, attending administrative hearings before the Equal Employment Opportunity Commission, Department of Labor and National Labor Relations Board, as well as representing management in federal and state courts in litigated matters including discrimination and non-competition cases.

She currently is working with a team at Adventist Health System where they have recently launched a Medical Legal Partnership pilot program at one of its facilities. This Medical Legal Partnership offers pro bono legal representation to patients who have legal issues that impact their health.

Ms. Adams received a BA in English, cum laude and graduated with honors in general education from Atlantic Union College in South Lancaster, MA. She also graduated cum laude from the University of Minnesota Law School.

Stephanie Blackman

Stephanie A.H. Blackman is vice president, general counsel and secretary for Closure Systems International Inc. (CSI). CSI manufactures and sells plastic closures and caps for the food, beverage, and other markets. CSI is a privately owned business operating in more than 30 countries. Ms. Blackman is responsible for all of CSI's global legal functions, including commercial, labor and employment, corporate governance, real estate, and intellectual property matters, as well as litigation management.

Before going in-house, Ms. Blackman was in private practice for seven years, focusing primarily on labor and employment defense.

Ms. Blackman is on the ACC's Indiana Chapter board of directors, volunteers frequently at her children's school, and is an active member of her church.

Ms. Blackman received her BS in Broadcast Journalism with highest honors from the University of Illinois at Urbana-Champaign. She graduated from Vanderbilt University Law School, where she was elected to the Order of the Coif.

Patrick McGlone

Patrick McGlone is senior vice president, general counsel and chief compliance officer at Ullico Inc., an insurance and financial services company in Washington, D.C. The Ullico companies market insurance and investment products and services to labor unions, union-affiliated benefit plans, union members and retirees. He supervises a staff of nine attorneys, compliance professionals and support staff.

Mr. McGlone has previously held in-house positions at Mobil Corporation and U.S. Office Products, Inc. He served as a litigation attorney at the Federal Deposit Insurance Corporation and began his legal career at the law firm of Hunton & Williams.

He is active in numerous professional and civic organizations. He is the vice president of the Council for Court Excellence and a Fellow of the American Bar Association. He has served as finance officer and council member of the ABA's section of individual rights and responsibilities. In the District of Columbia Bar, he has served as secretary and as chair of the Nominations Committee. Since 2009, he has served on the board of directors of Us Helping Us, People Into Living, Inc., a Washington, D.C. non-profit that provides HIV/AIDS services. Mr. McGlone received the Outstanding Community Service Award from the Washington Area Corporate Counsel Association in 2011 and the Chairman's Award from Us Helping Us in 2001.

Mr. McGlone is a graduate of The George Washington University Law School (with high honors) and a graduate of Fordham College (summa cum laude).

Kimberly Seten

Kimberly F. Seten, a managing partner with Constangy, Brooks & Smith, LLP, focuses her practice on helping employers proactively address workplace manners. Whether assisting in the development of workplace policies, investigation procedures and training materials, preparing employee handbooks and procedure manuals, conducting training for management, supervisors, and employees on workplace conduct, or advising on problem employees, she believes that the best way to minimize litigation in the workplace is to address issues before they become problems. When litigation arises, however, she represents clients before federal and state agencies as well as in the state and federal courts of Missouri and Kansas. She also works with employers to develop strategies for addressing union issues, including running union avoidance campaigns, negotiating collective bargaining agreements, administering labor contracts, and representing employers in unfair labor practice charges.

Recognized as a Rising Star in 2011 and 2012 by SuperLawyers, she is a frequent presenter throughout the United States. She is a contributing author of How To Take A Case Before The NLRB (2008) and has published articles in newspapers and trade publications. She is a past vice-chair of the Labor and Employment Committee of the Kansas City Metropolitan Bar Association and the current chair of the Heartland Labor and Employment Institute.

Ms. Seten received a BS from the University of Illinois and is a graduate of the University of Miami School of Law.

Evan Turtz

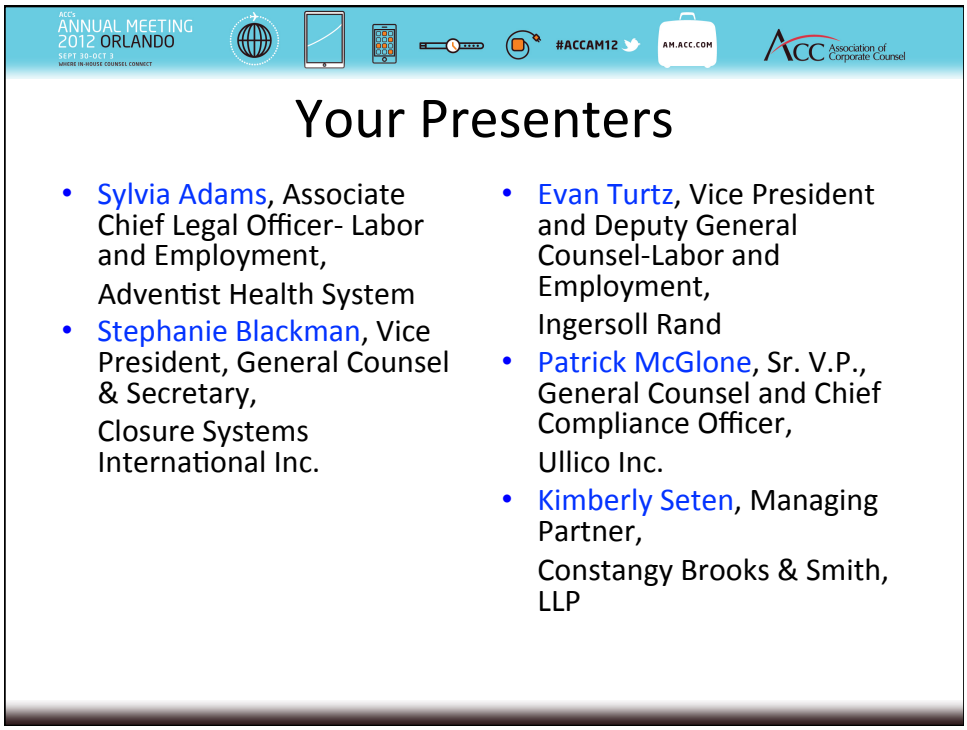
Evan M. Turtz is the vice president and deputy general counsel-labor and Employment for Ingersoll Rand. Mr. Turtz is responsible for the legal function as it relates to labor/employment, employment litigation, immigration, pension/benefits and compensation for the global Company. Mr. Turtz is a member of Ingersoll Rand's HR and legal leadership teams; the Sustainability Council; and the Progressive Diverse and Inclusionary Council. He also serves as the global data privacy officer for the company.

Mr. Turtz holds a BS from the University of Massachusetts at Amherst, a General Certificate from the London School of Economics and Political Science and a JD from Washington University School of Law, St. Louis, MO.

The "New" NLRB: Activist Board Or Rogue Agency?

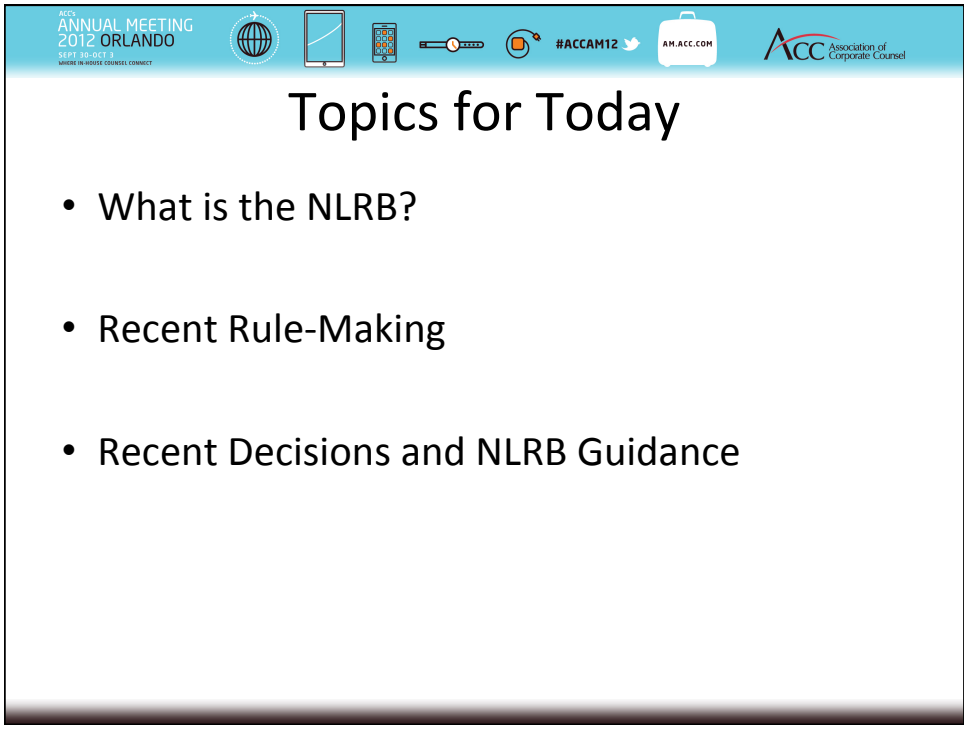
October 1, 2012

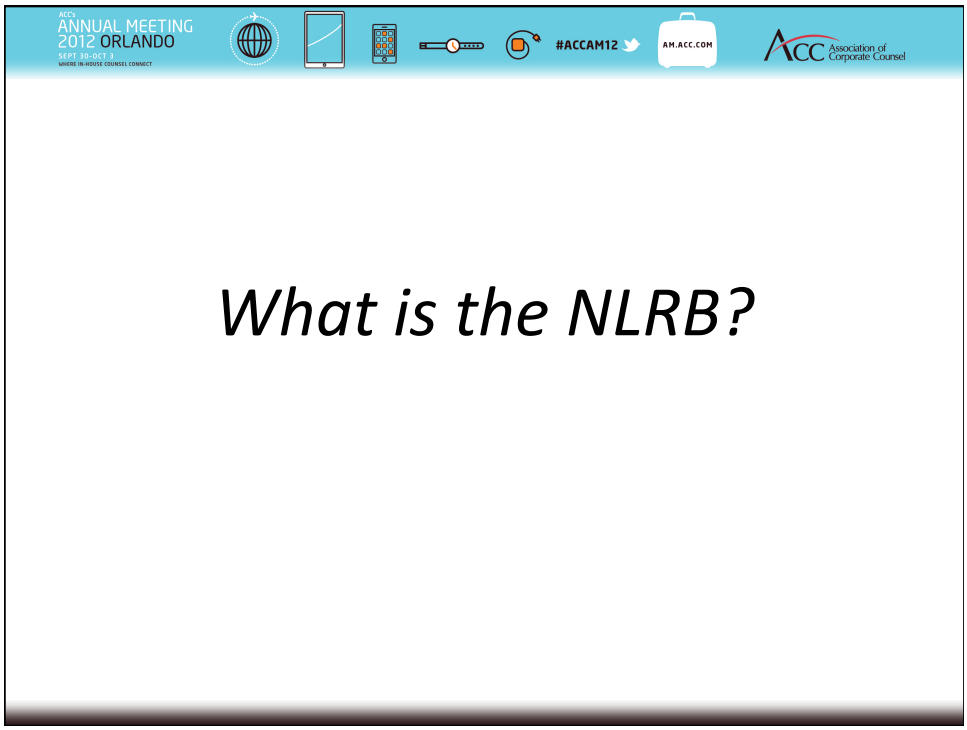
Orlando, Florida



Your Presenters

- Sylvia Adams, Associate Chief Legal Officer- Labor and Employment,
  Adventist Health System
- Stephanie Blackman, Vice President, General Counsel & Secretary,
  Closure Systems International Inc.
- Evan Turtz, Vice President and Deputy General Counsel-Labor and Employment,
  Ingersoll Rand
- Patrick McGlone, Sr. V.P., General Counsel and Chief Compliance Officer,
  Ullico Inc.
- Kimberly Seten, Managing Partner,
  Constangy Brooks & Smith, LLP





ANNUAL MEETING 2012 ORLANDO #ACCAM12 AM.ACC.COM ACC Association of Corporate Counsel

Purpose

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.

ANNUAL MEETING 2012 ORLANDO #ACCAM12 AM.ACC.COM ACC Association of Corporate Counsel

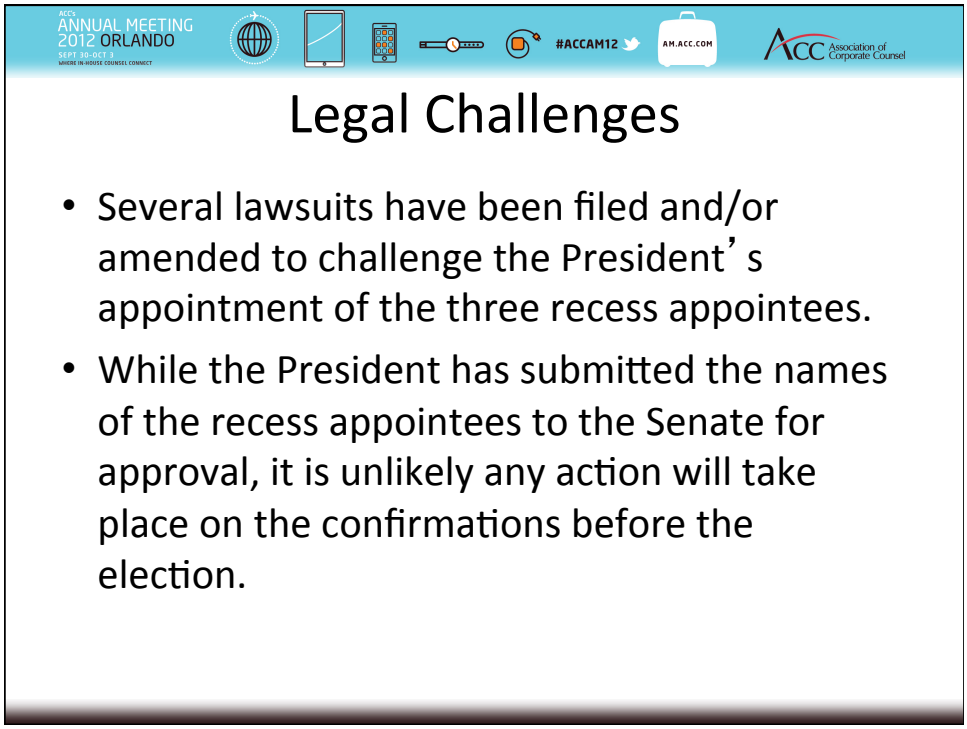
Mark Pearce, Chairman

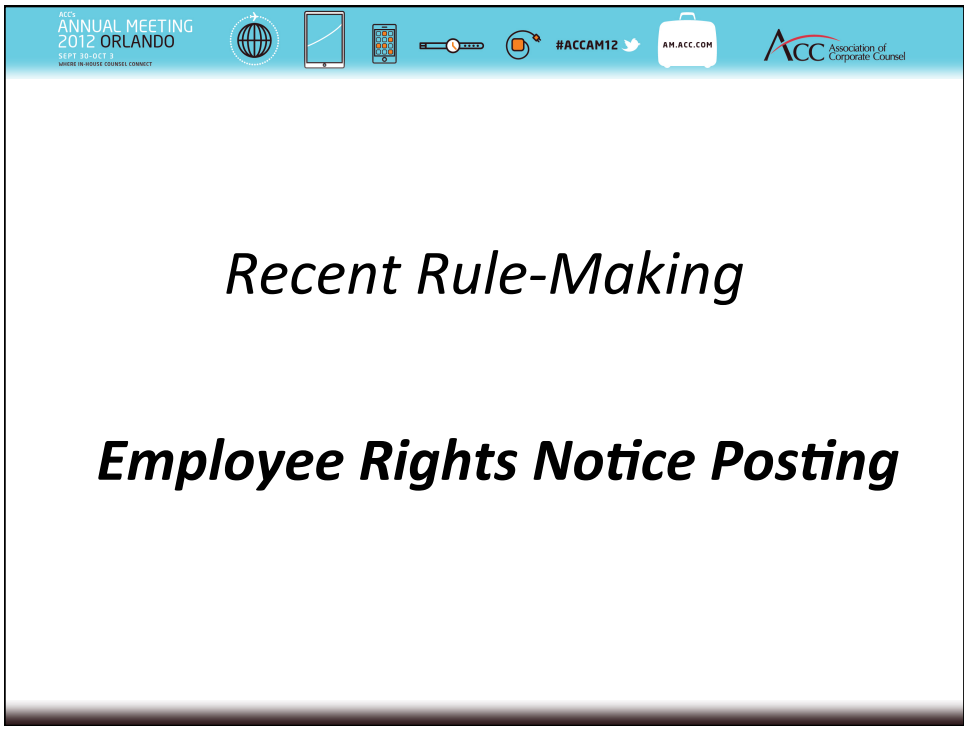
Sharon Block

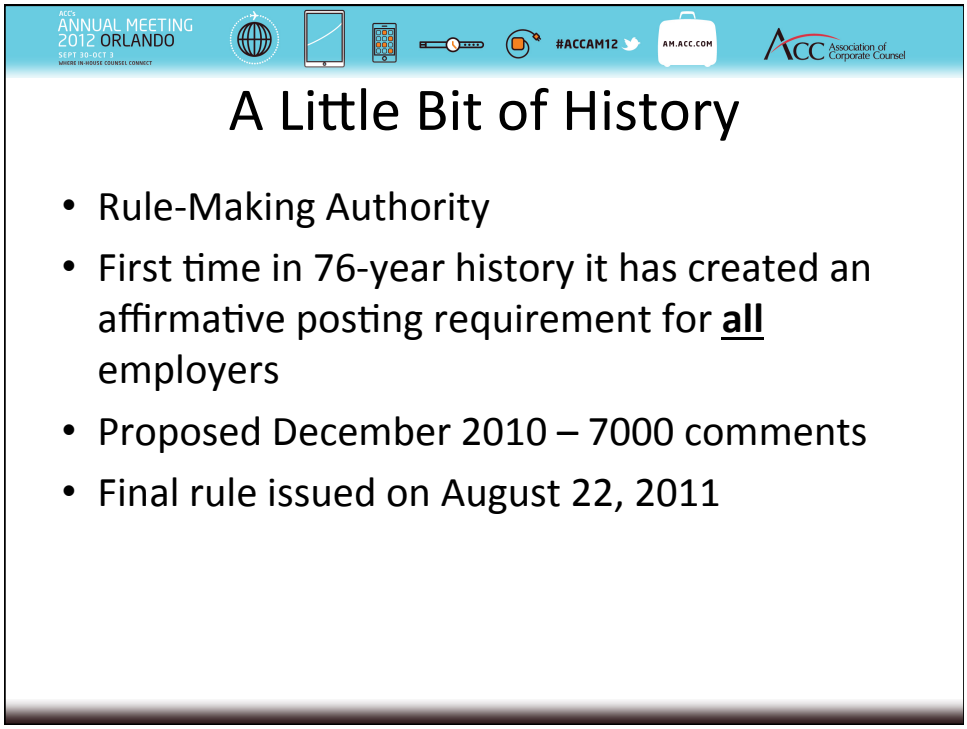
Richard Griffin

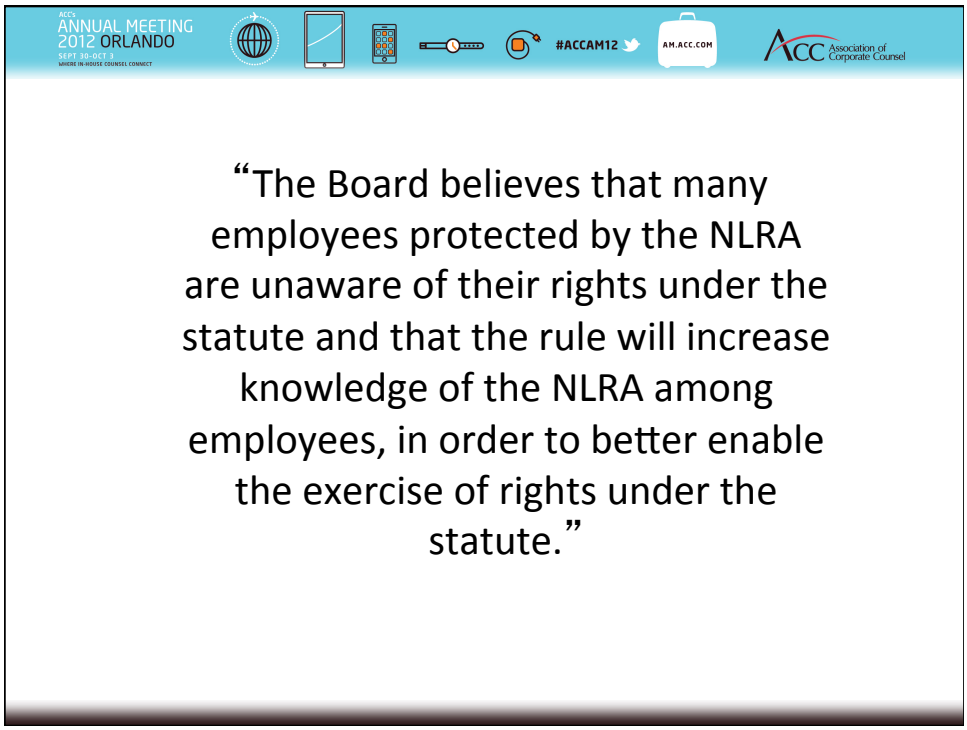
Brian Hayes

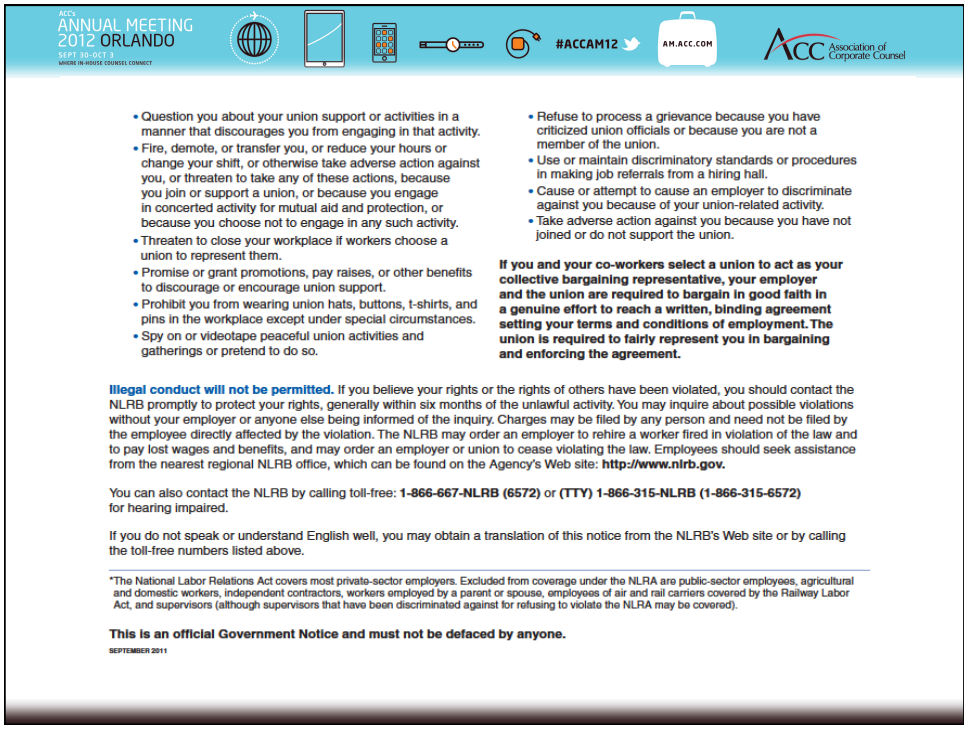
Lafe Solomon, Acting General Counsel











ANNUAL MEETING 2012 ORLANDO #ACCAM12 AM.ACC.COM ACC Association of Corporate Counsel

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

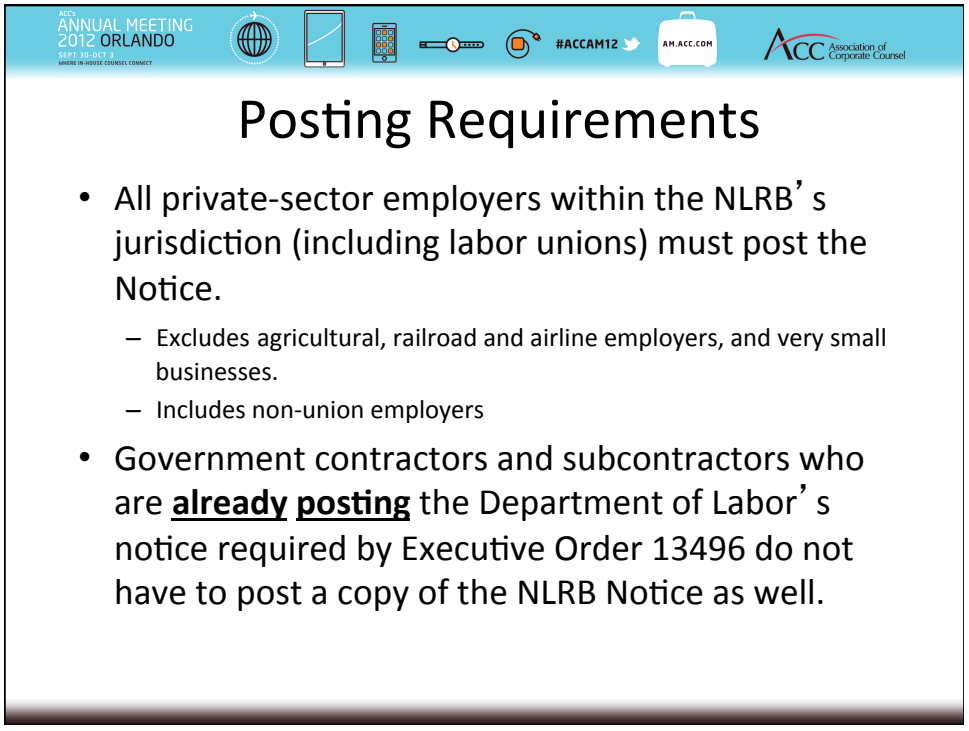
You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011



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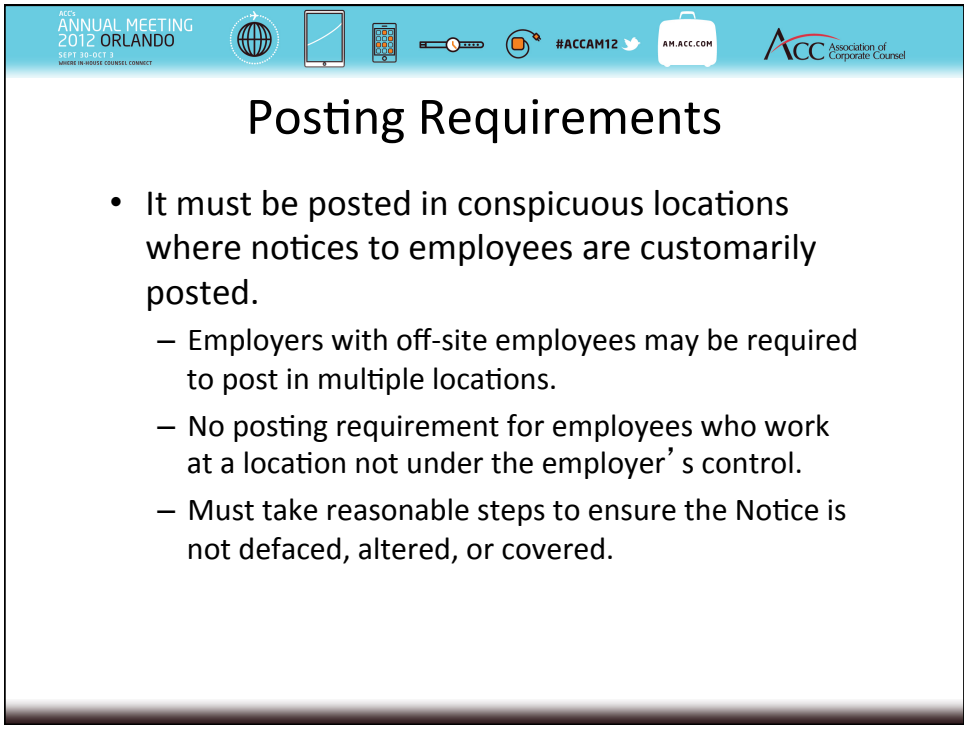
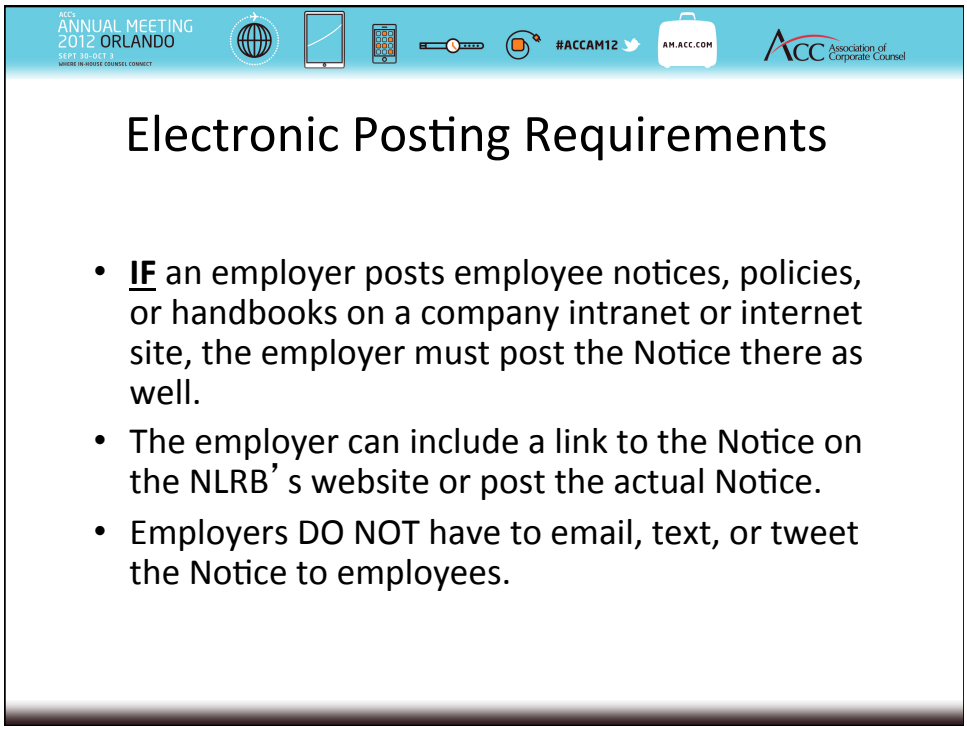
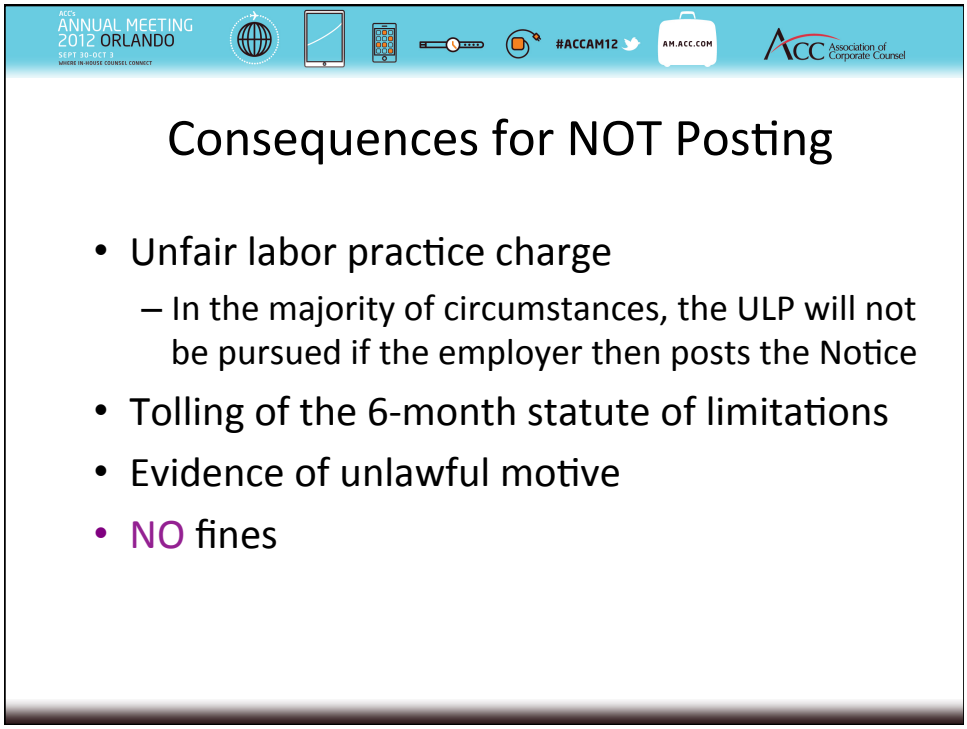
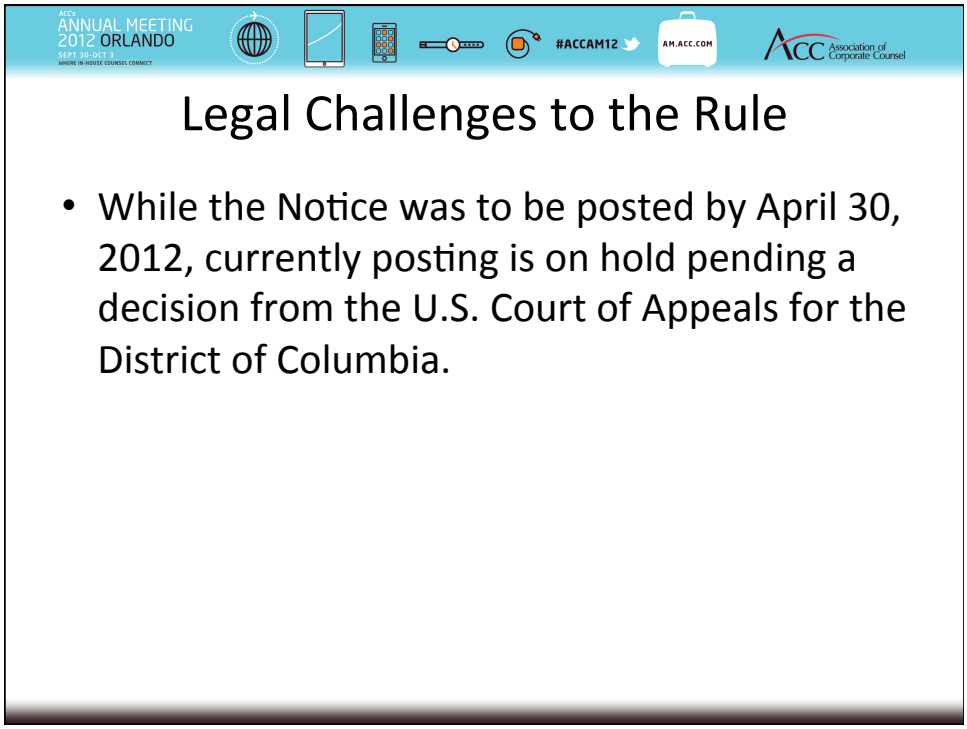
Posting Requirements

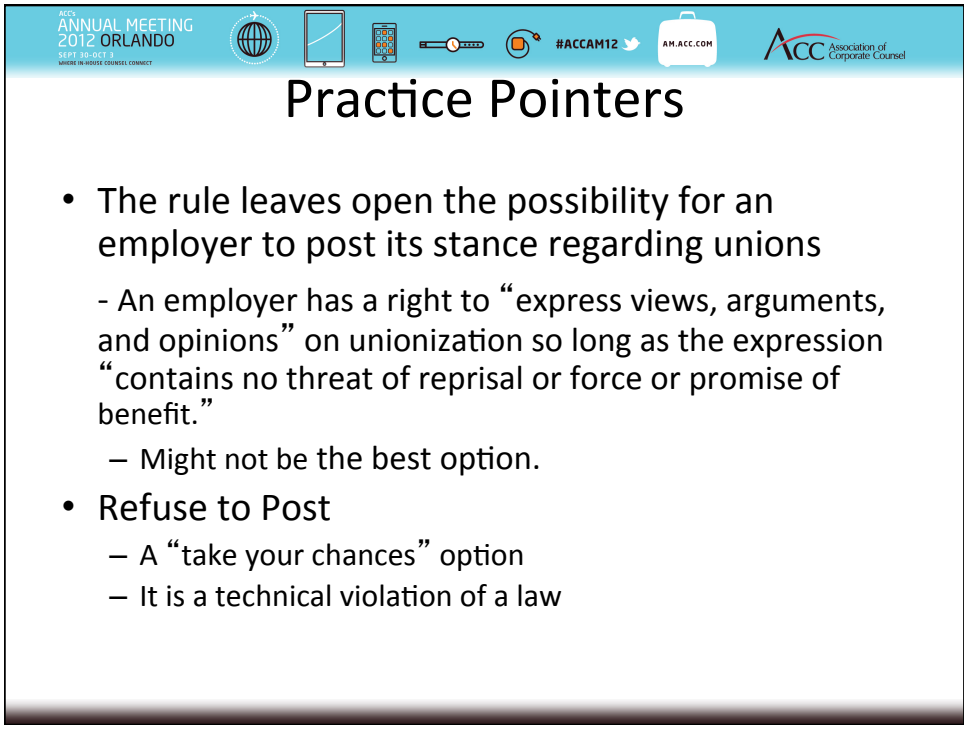
- All private-sector employers within the NLRB's jurisdiction (including labor unions) must post the Notice.
  - Excludes agricultural, railroad and airline employers, and very small businesses.
  - Includes non-union employers
- Government contractors and subcontractors who are **already posting** the Department of Labor's notice required by Executive Order 13496 do not have to post a copy of the NLRB Notice as well.

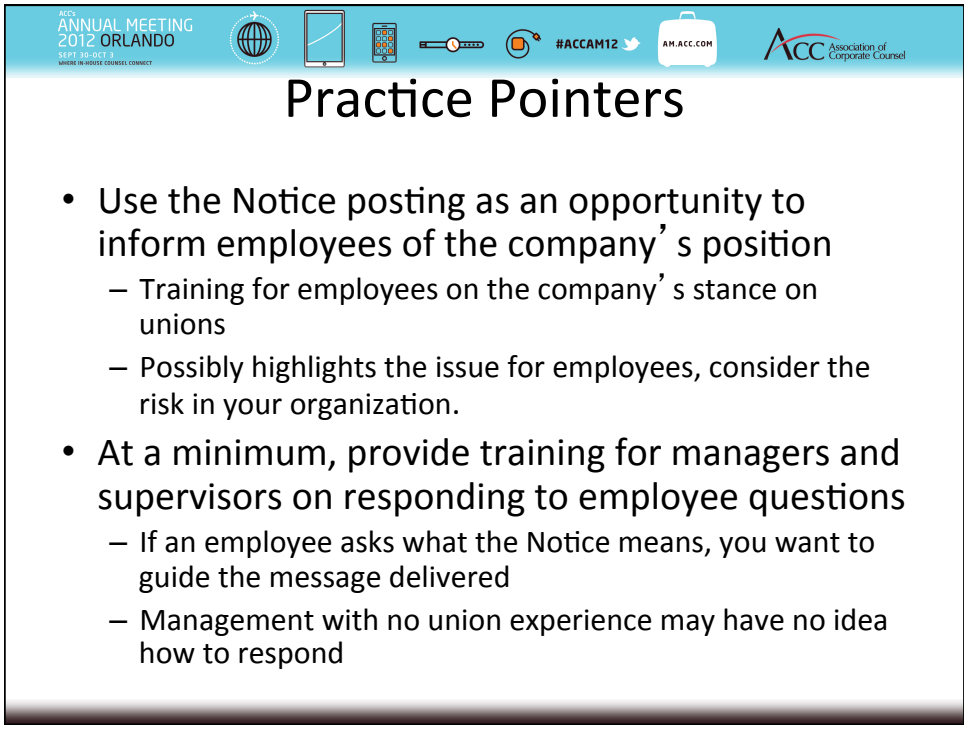


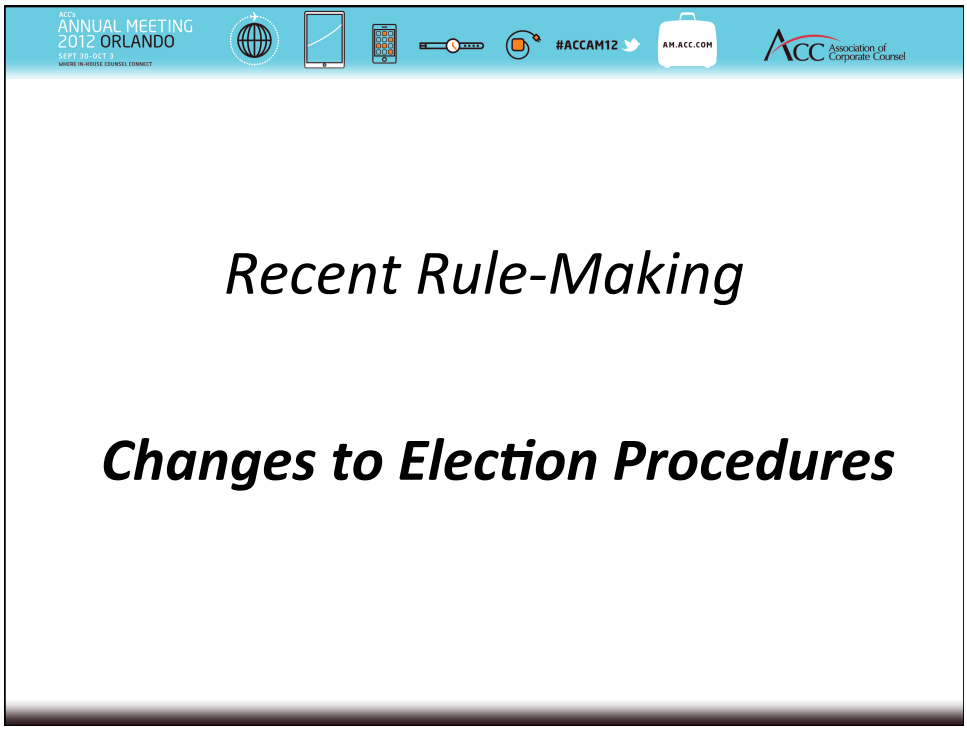


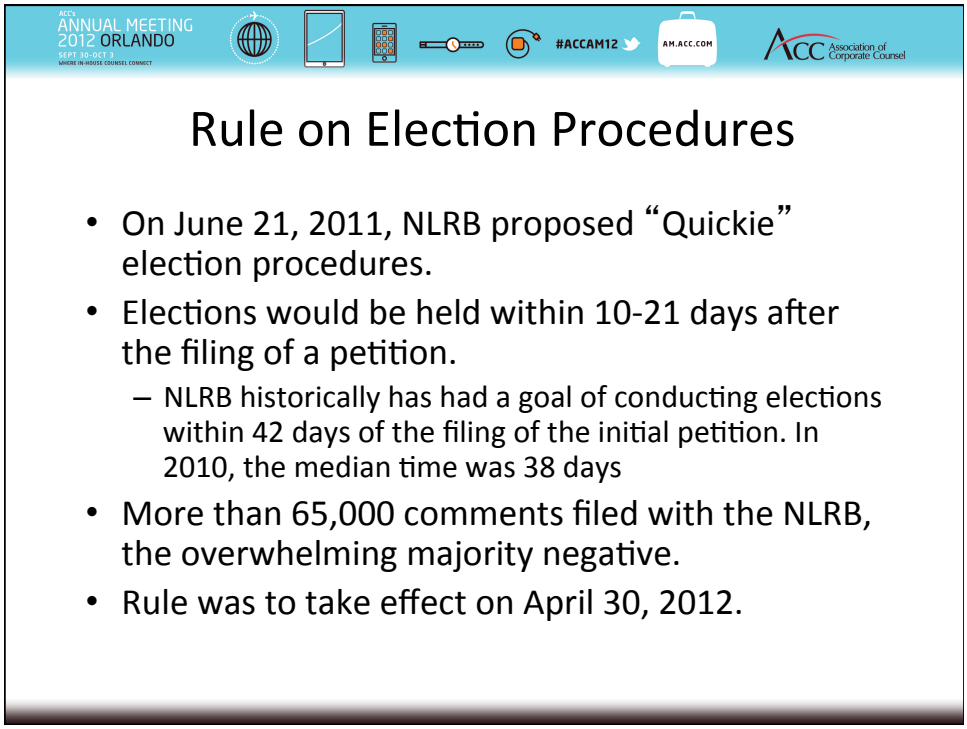






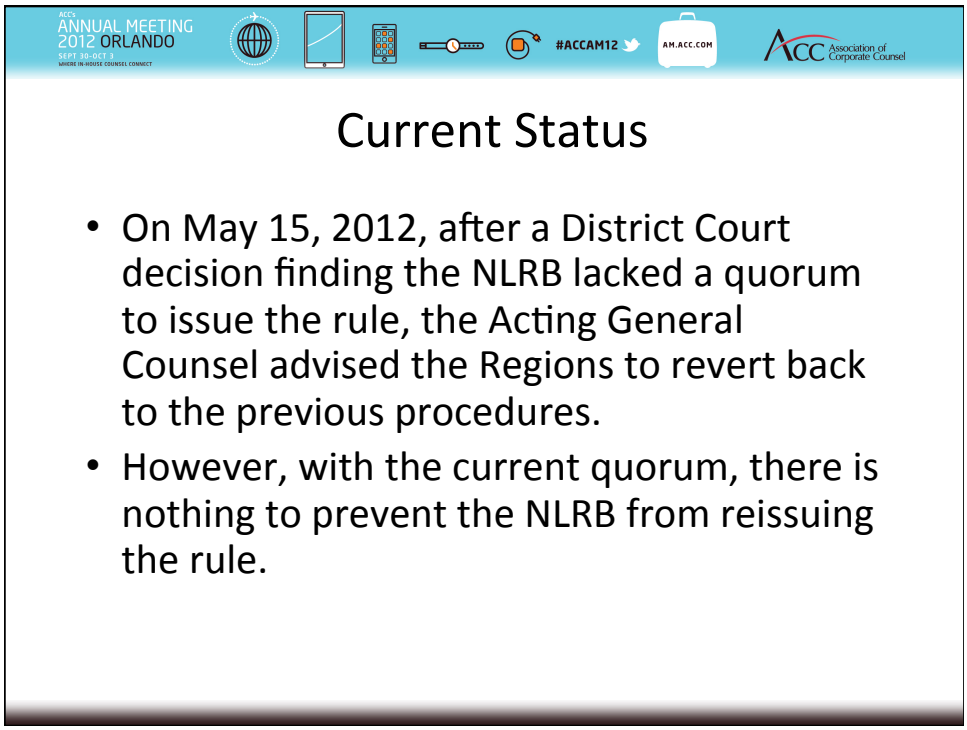






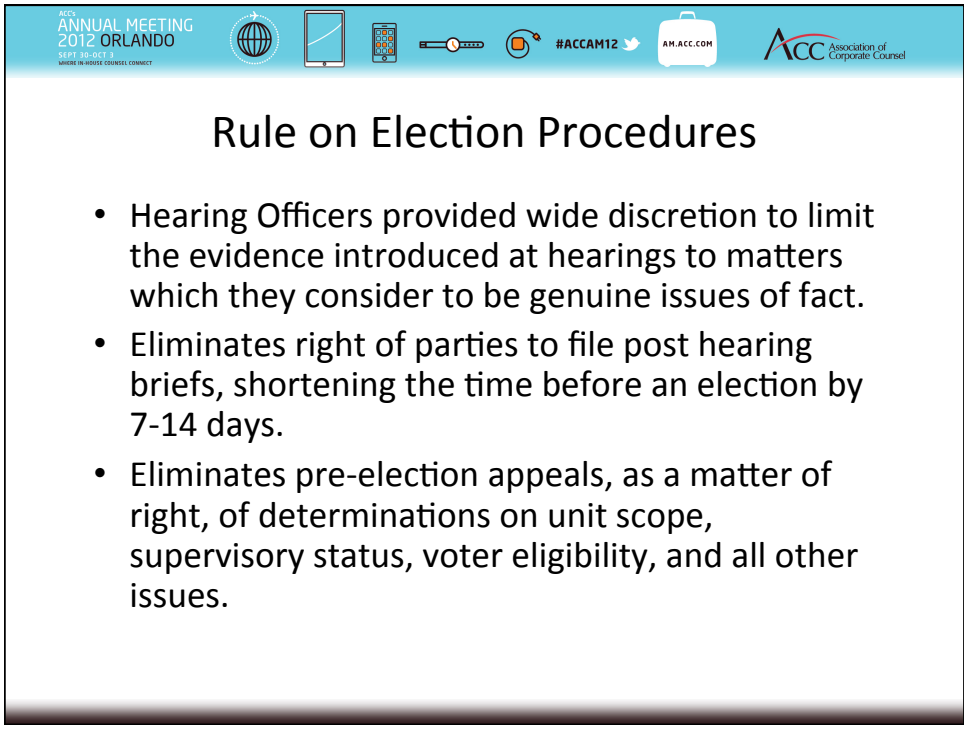
Rule on Election Procedures

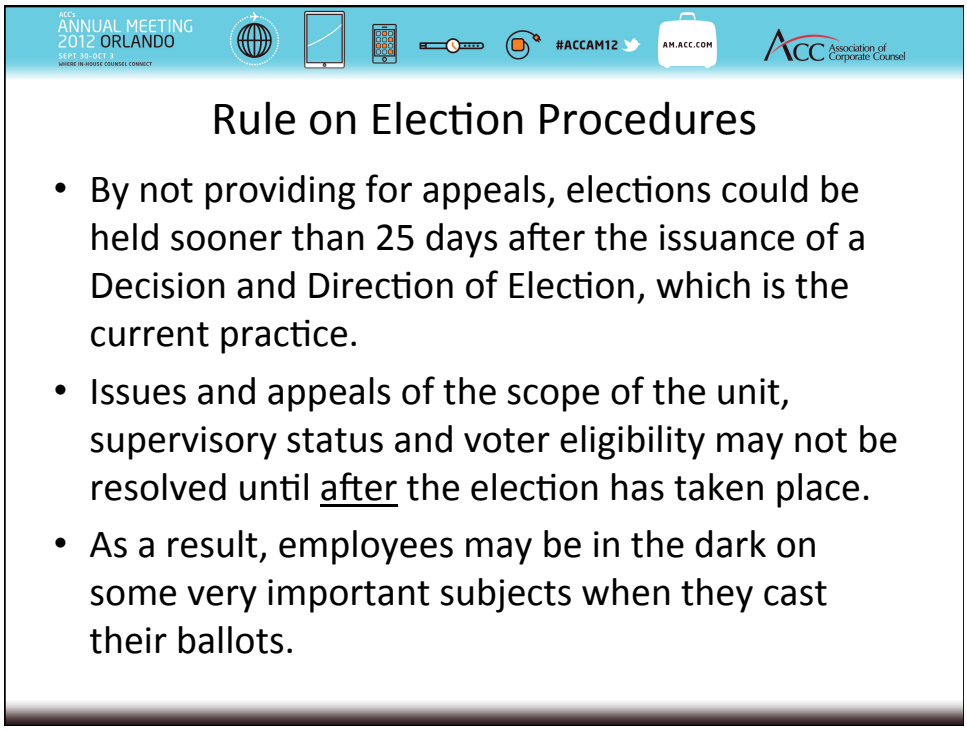
- On June 21, 2011, NLRB proposed "Quickie" election procedures.
- Elections would be held within 10-21 days after the filing of a petition.
  - NLRB historically has had a goal of conducting elections within 42 days of the filing of the initial petition. In 2010, the median time was 38 days
- More than 65,000 comments filed with the NLRB, the overwhelming majority negative.
- Rule was to take effect on April 30, 2012.

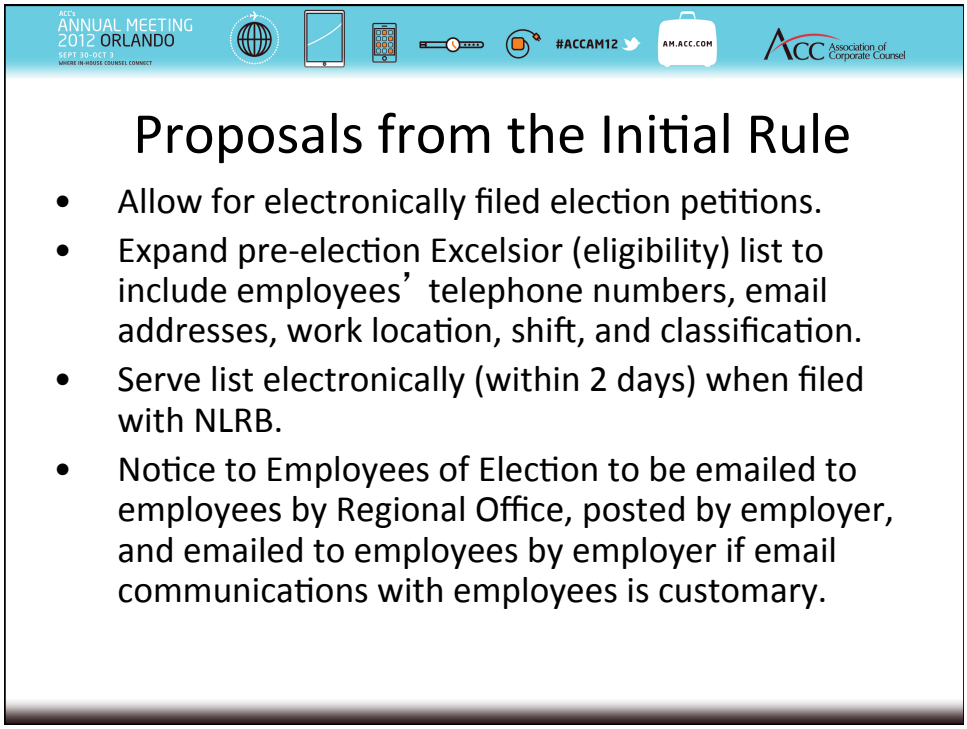


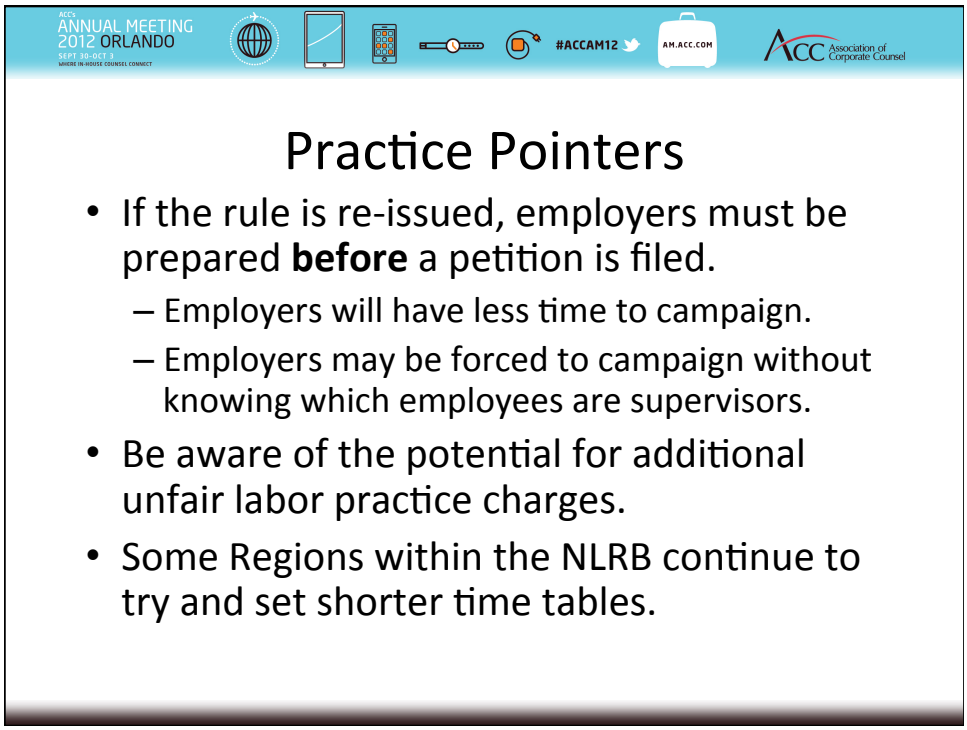
Current Status

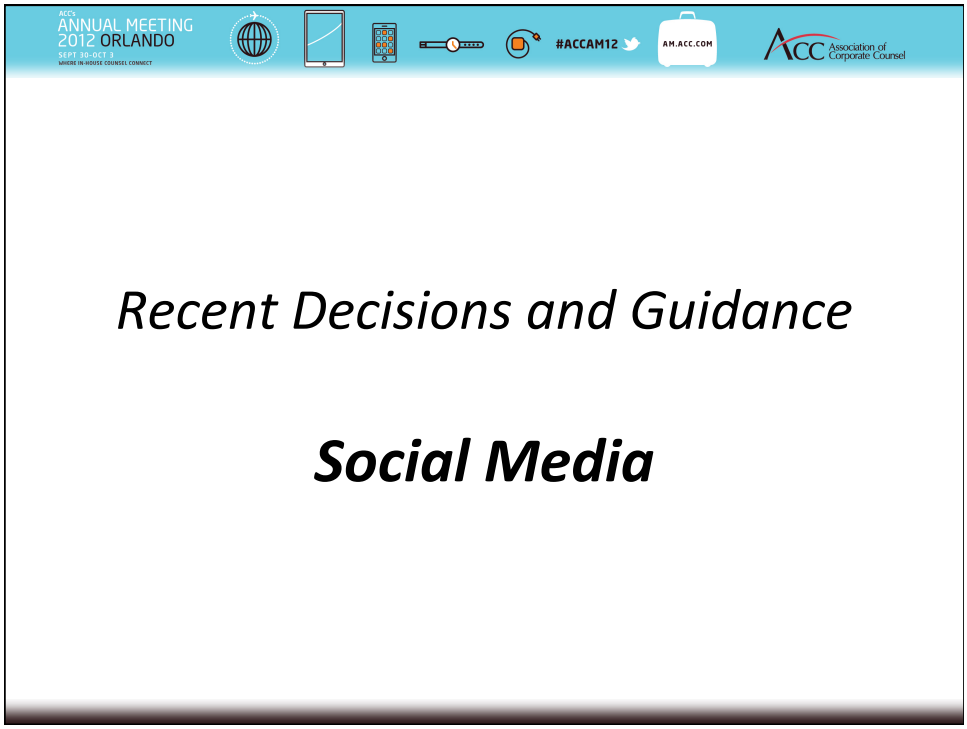
- On May 15, 2012, after a District Court decision finding the NLRB lacked a quorum to issue the rule, the Acting General Counsel advised the Regions to revert back to the previous procedures.
- However, with the current quorum, there is nothing to prevent the NLRB from reissuing the rule.

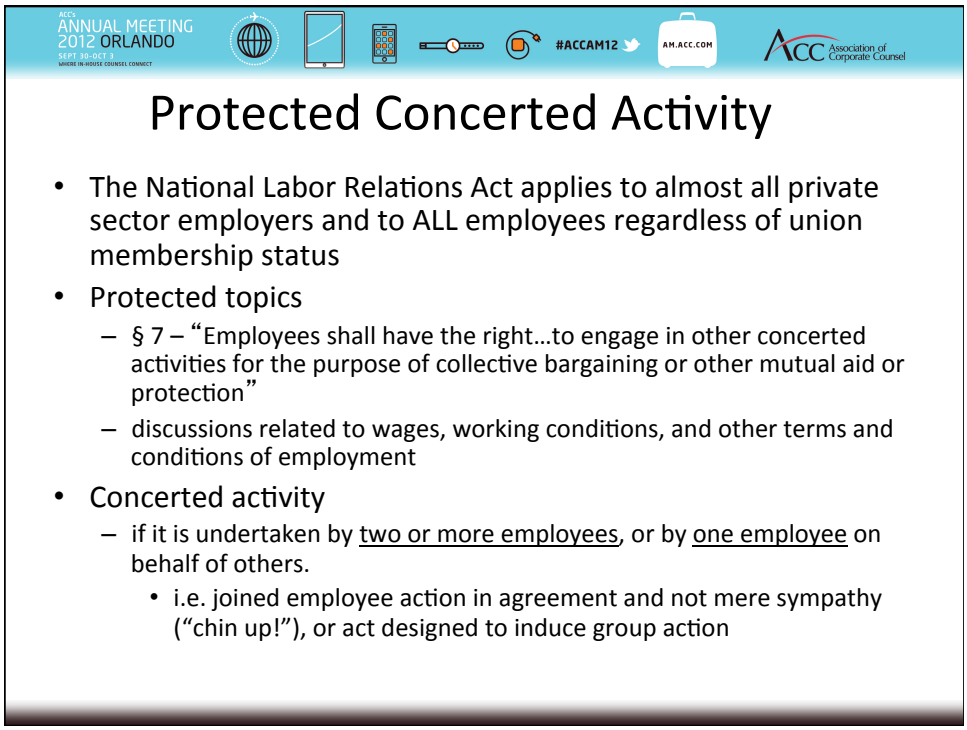


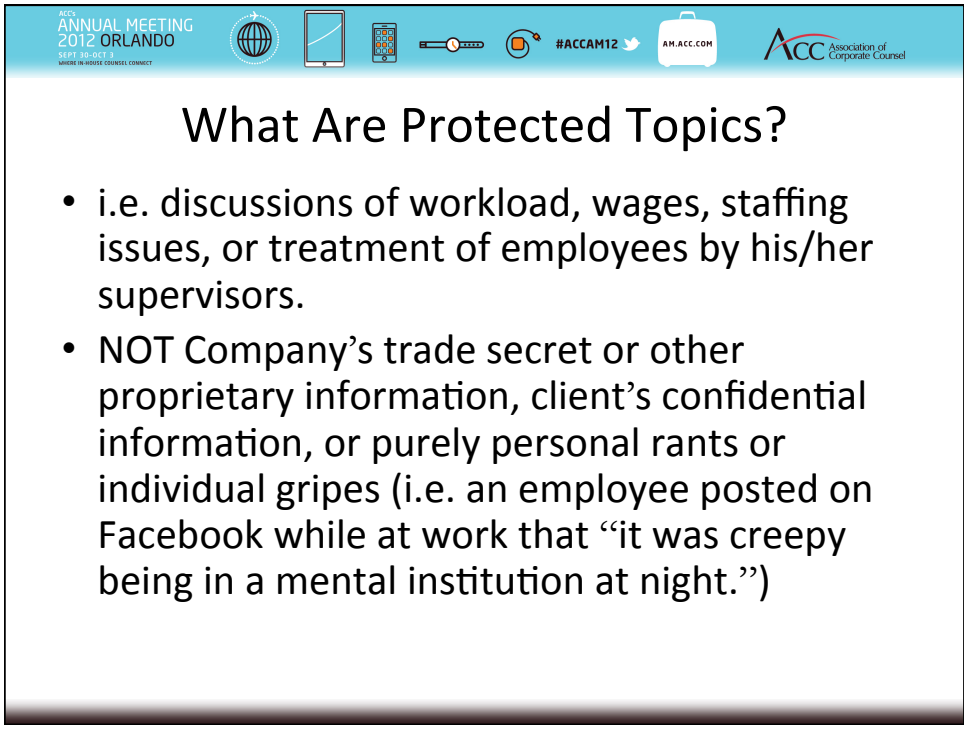


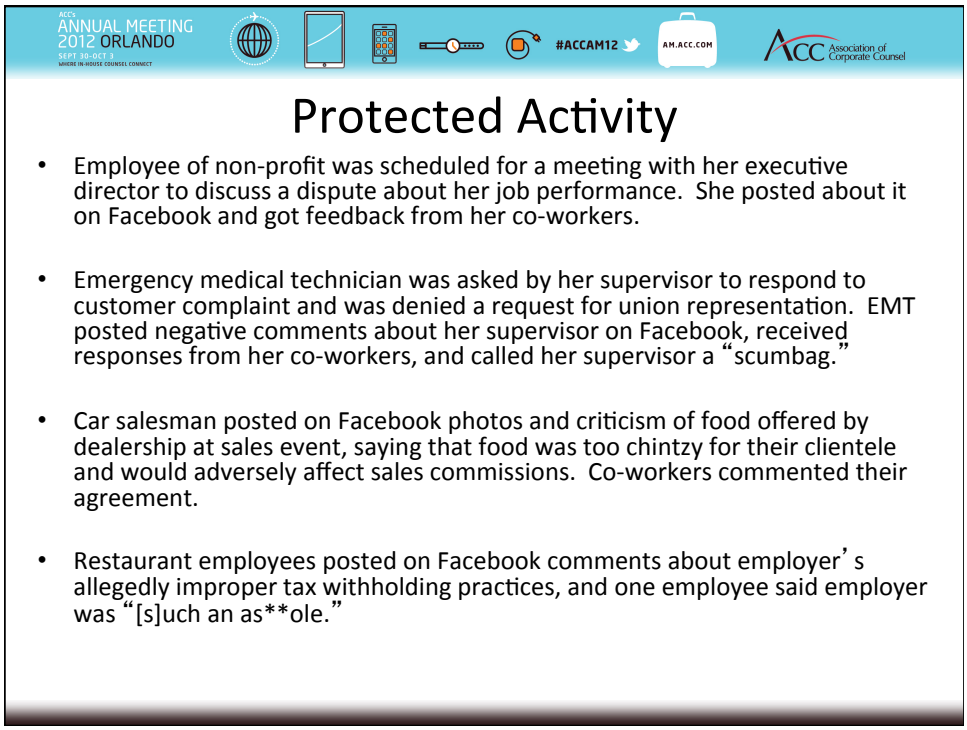


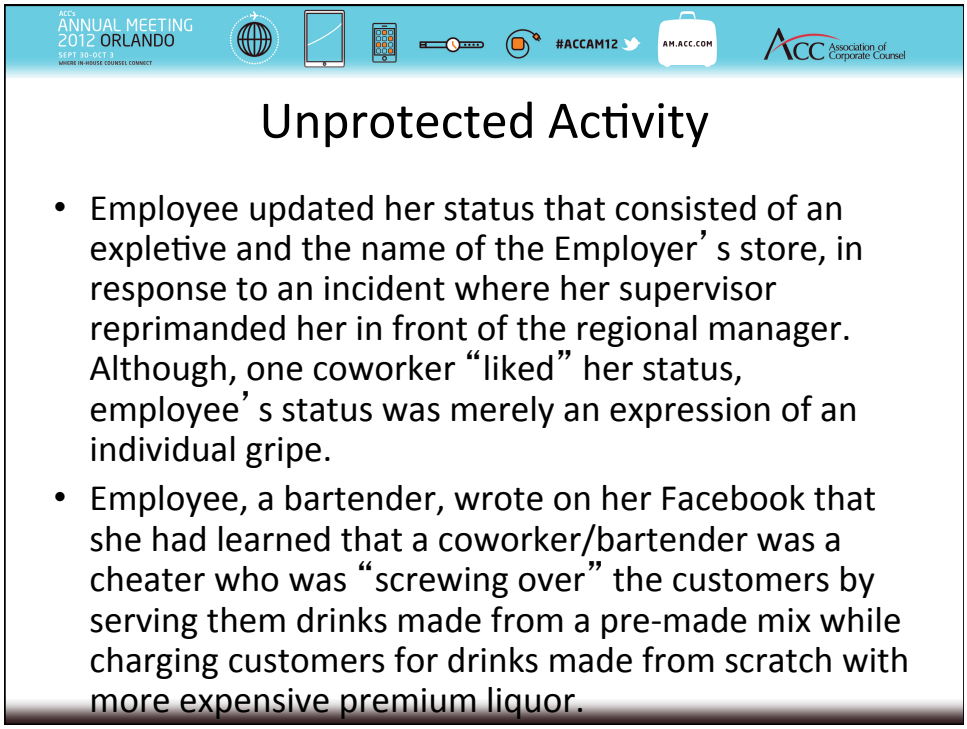


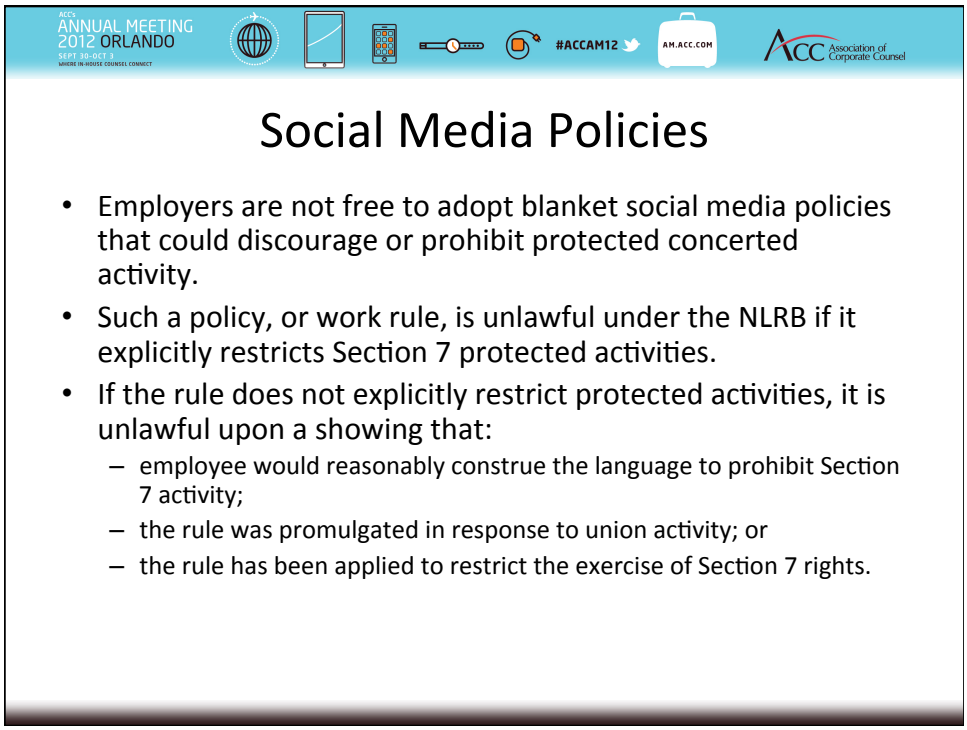


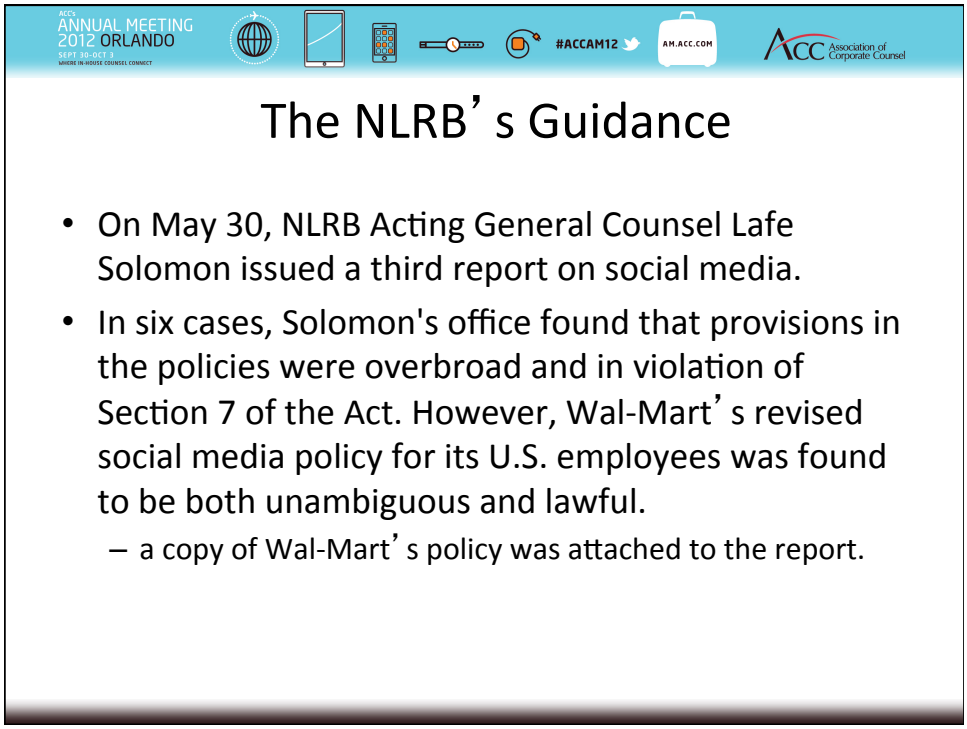


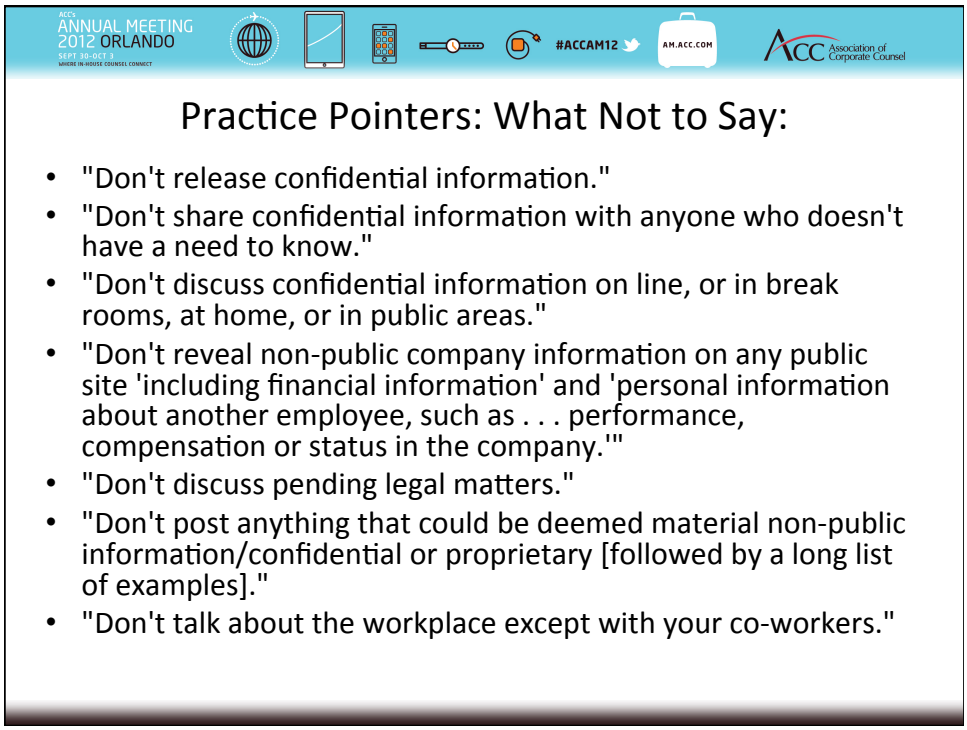


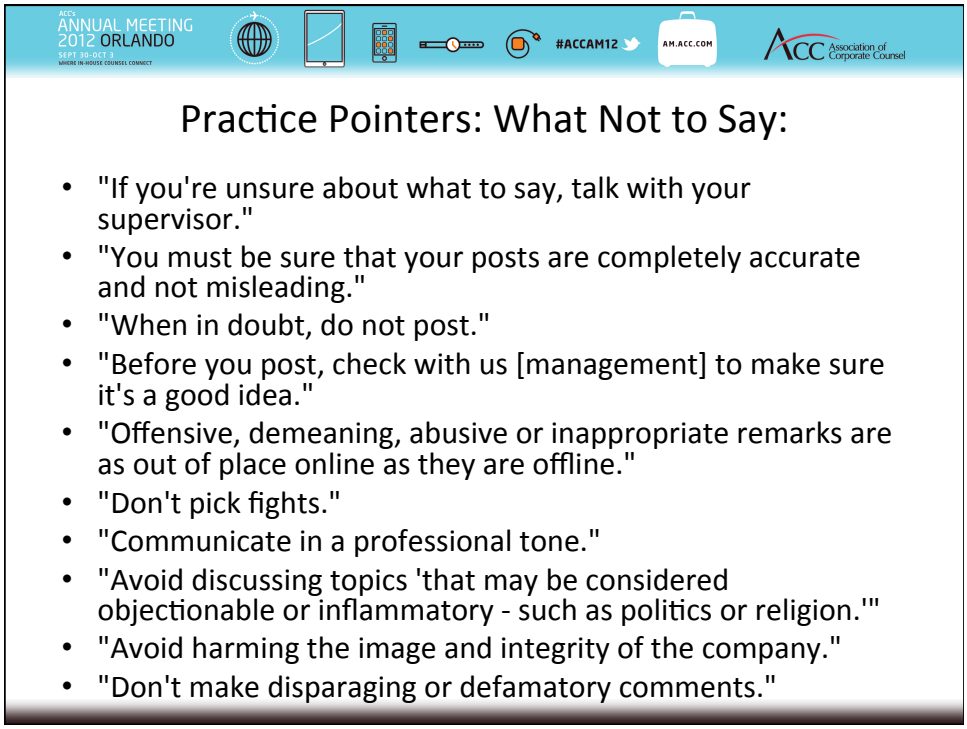


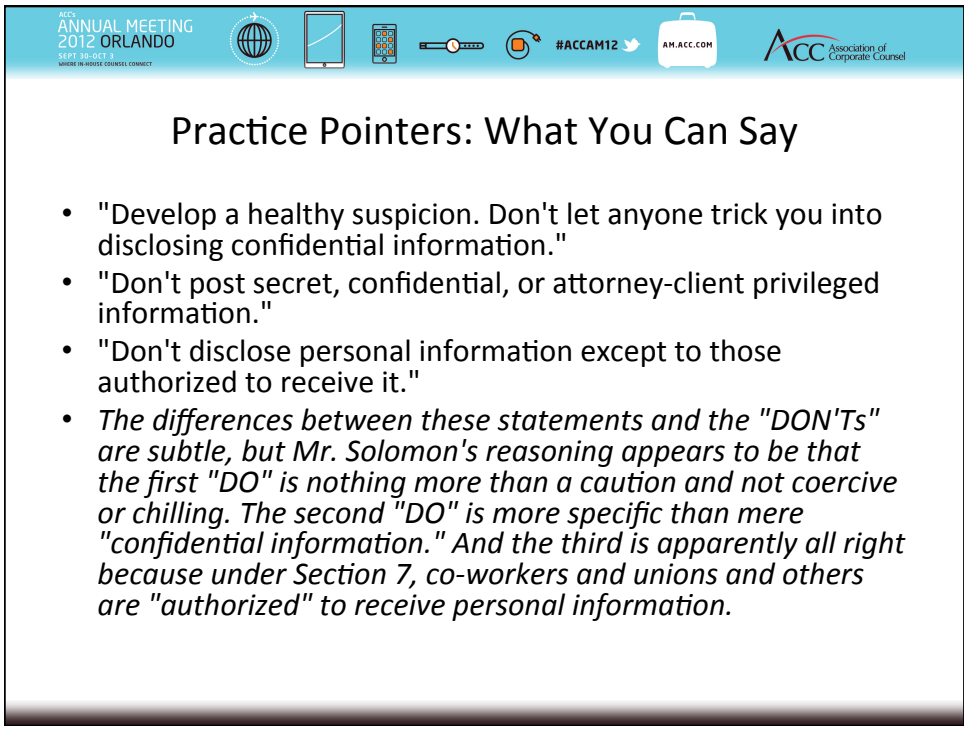


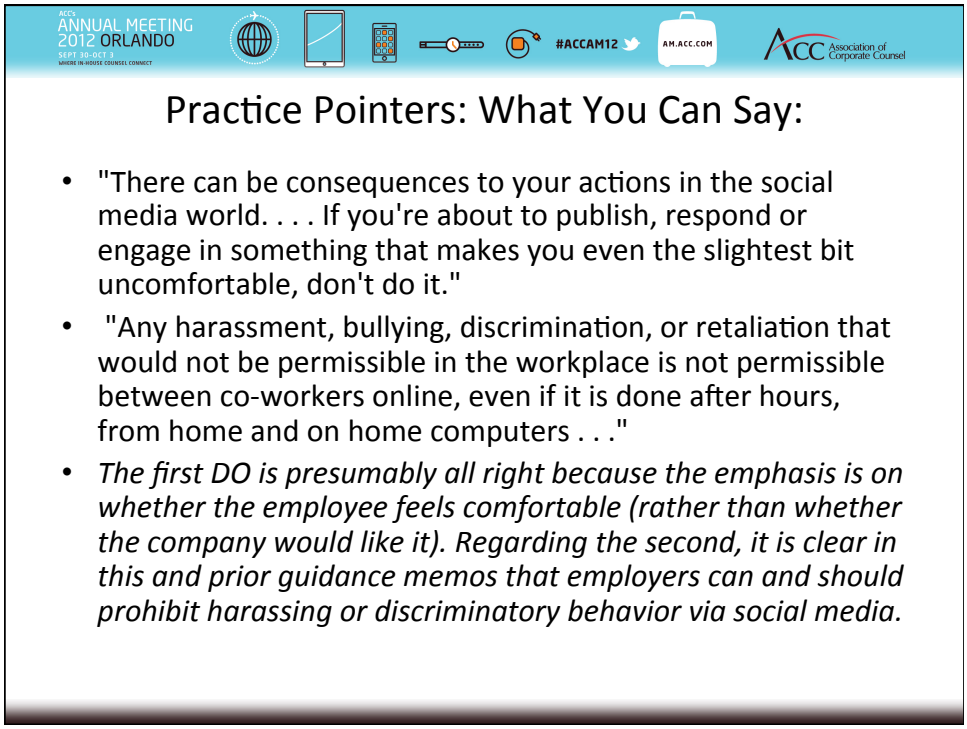


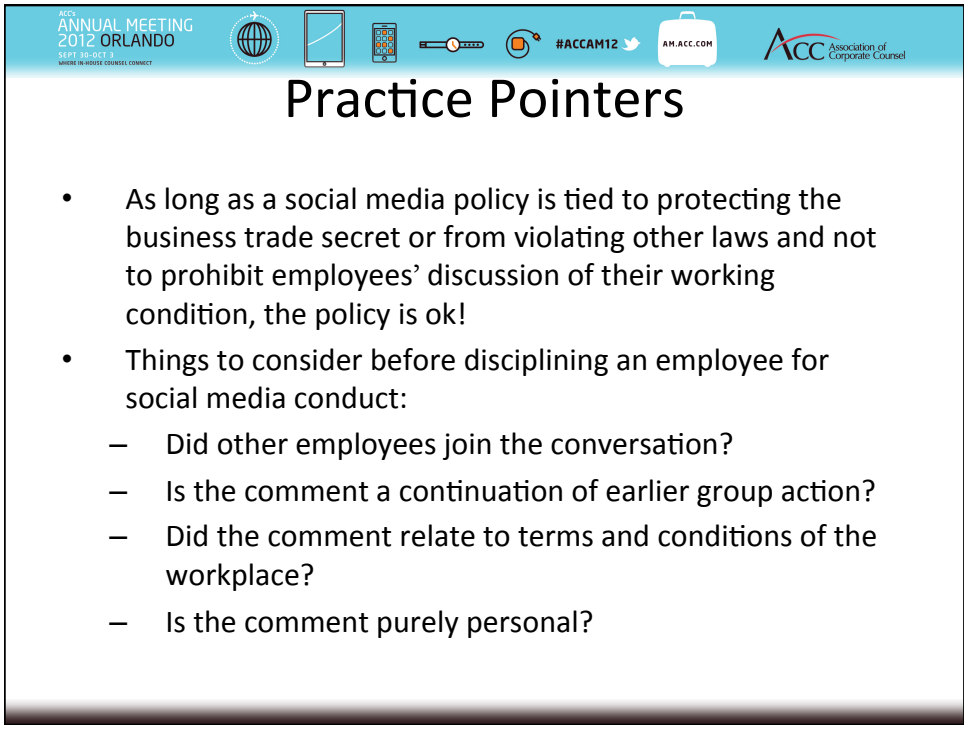


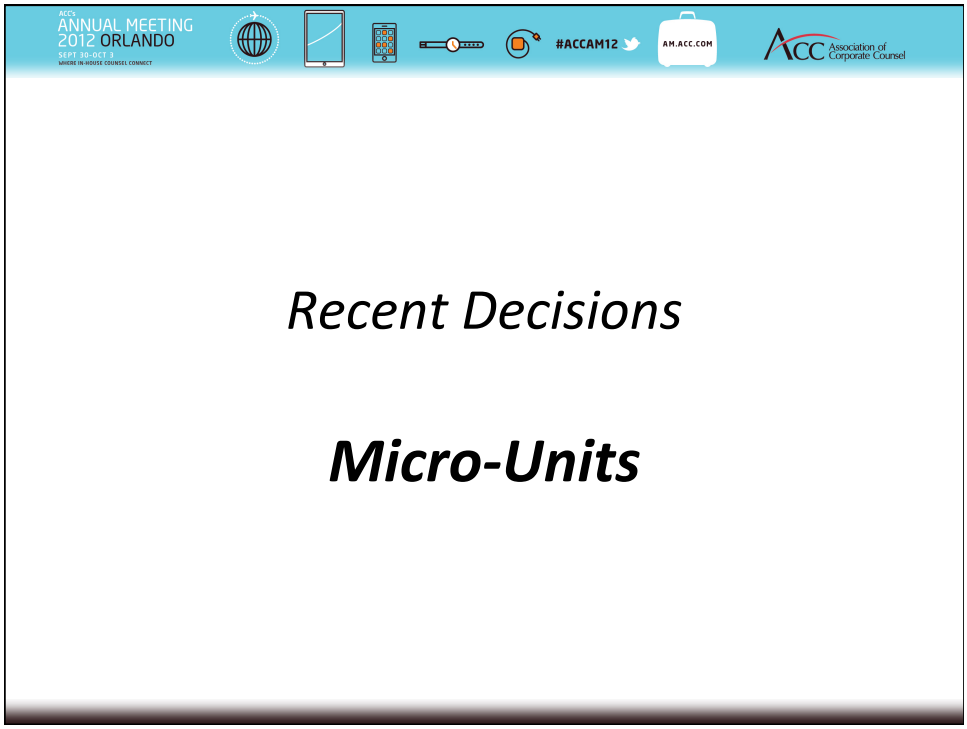


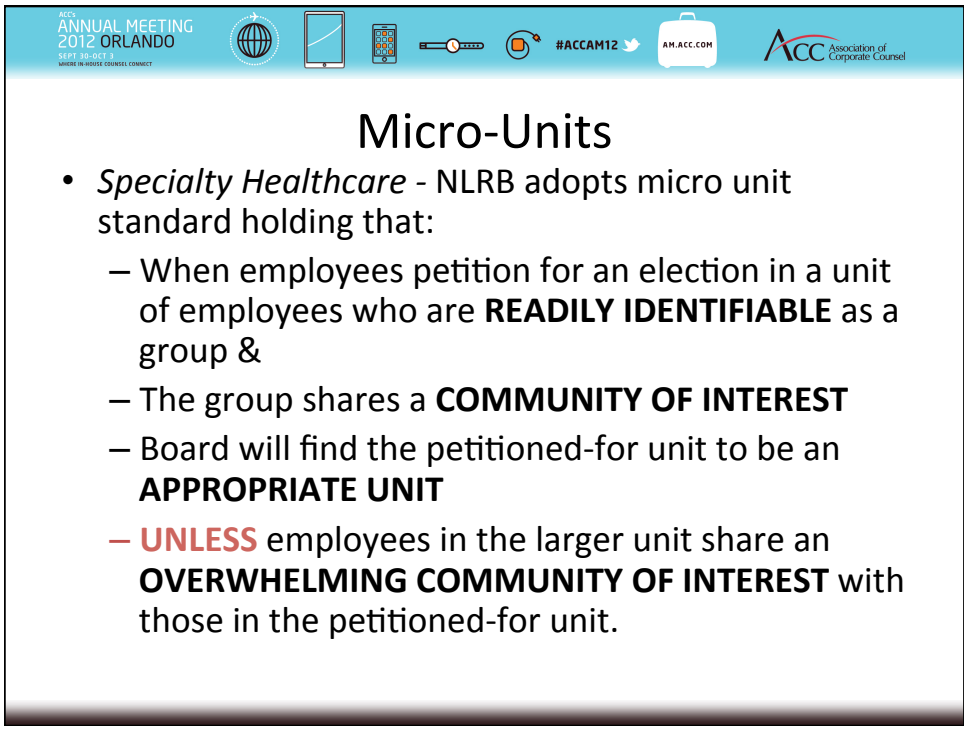


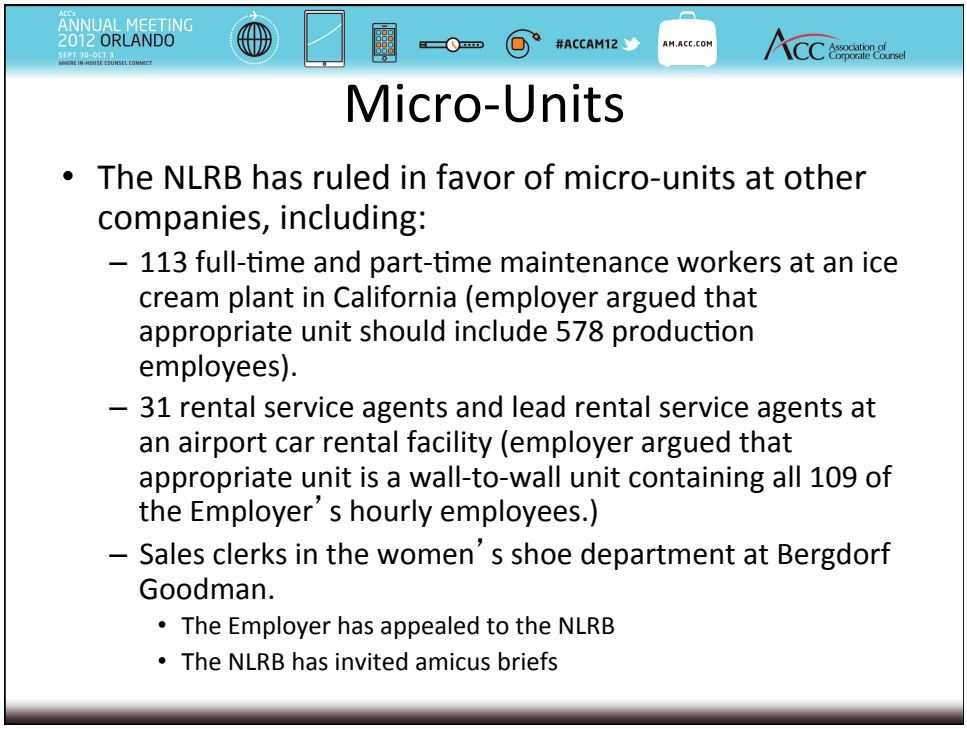


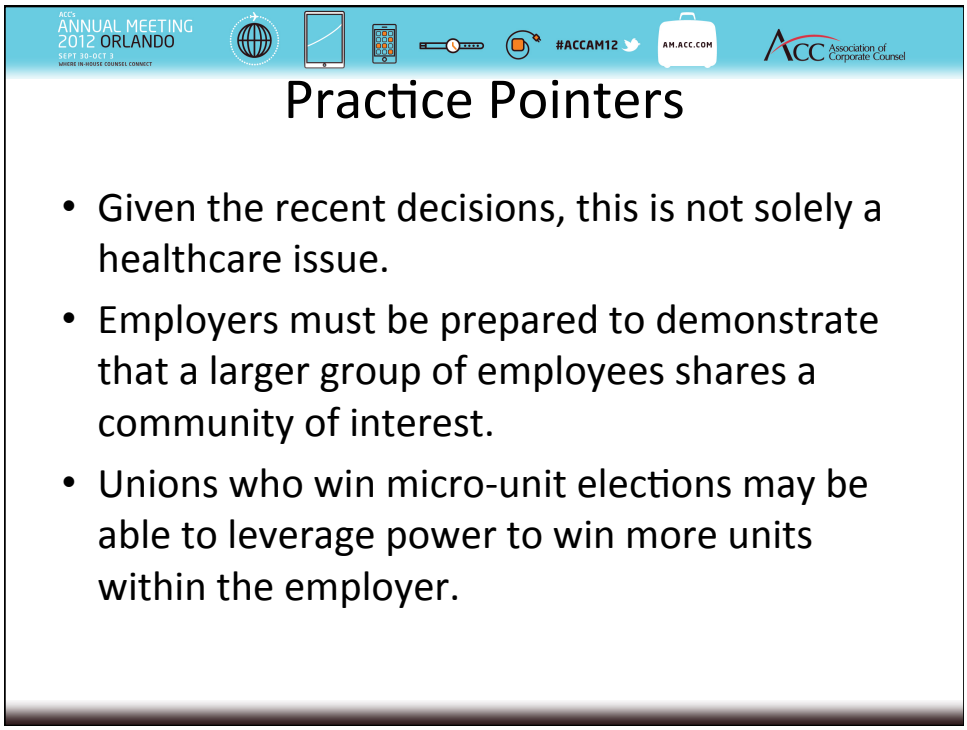


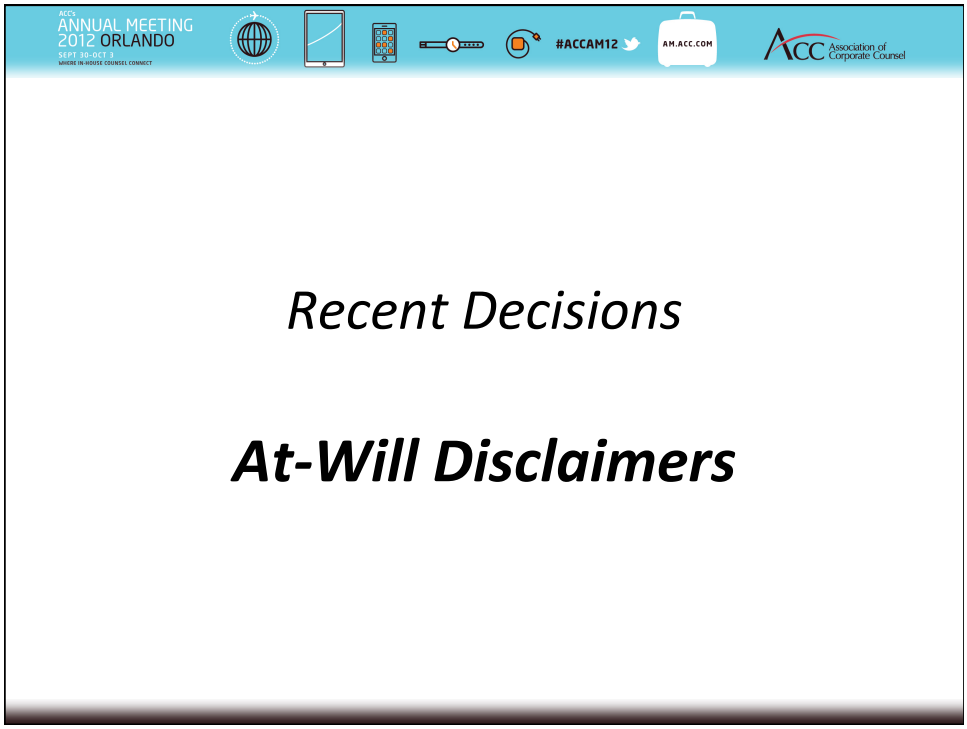


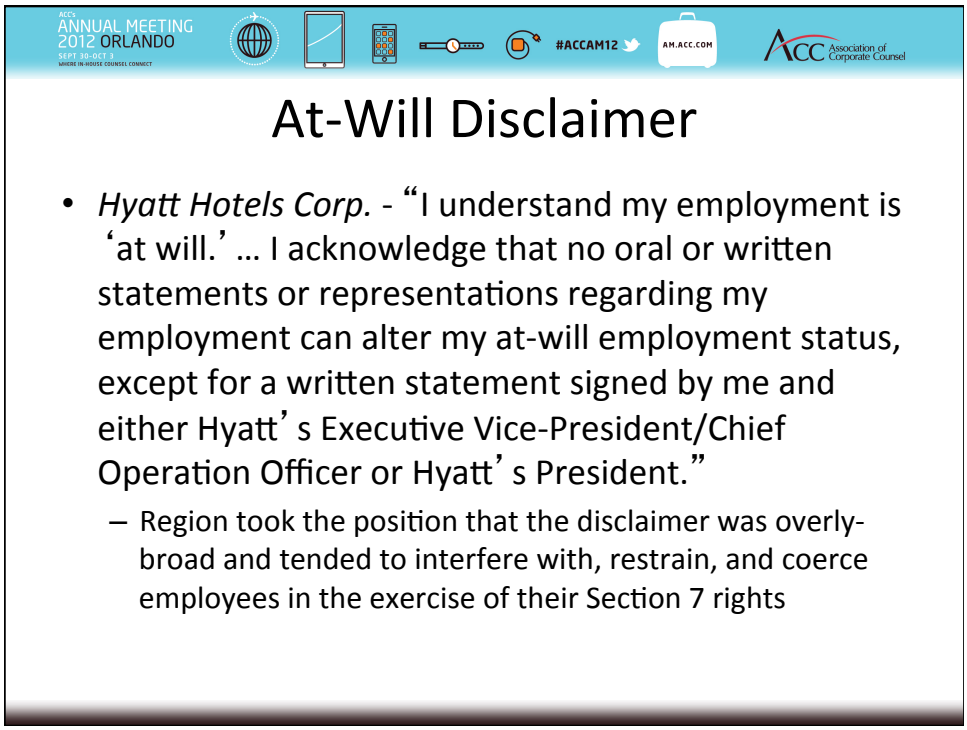


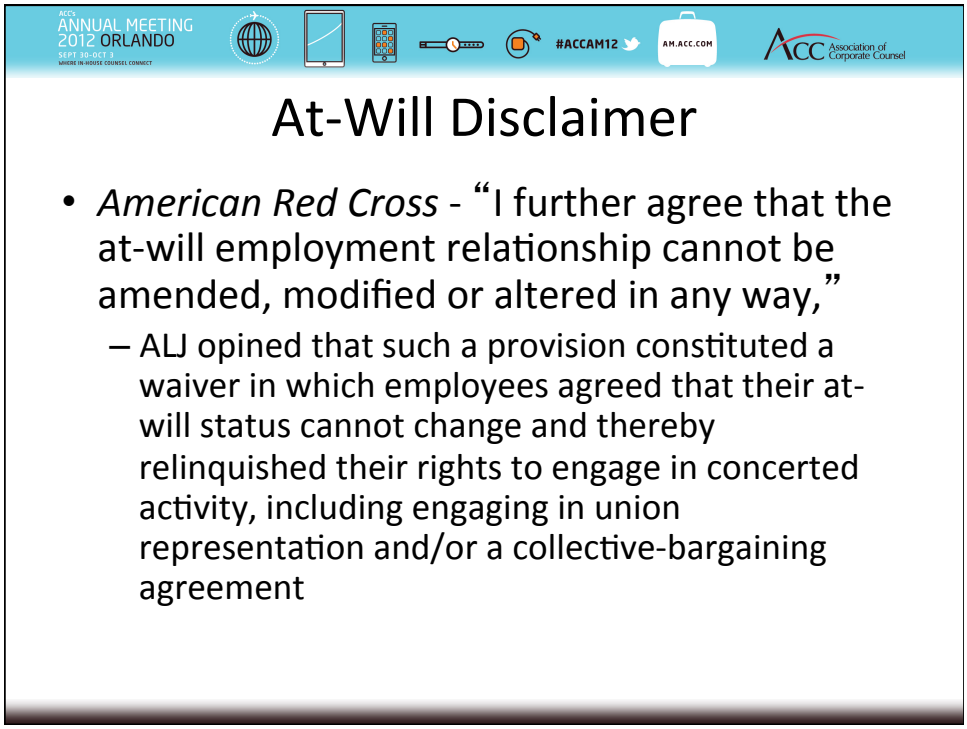


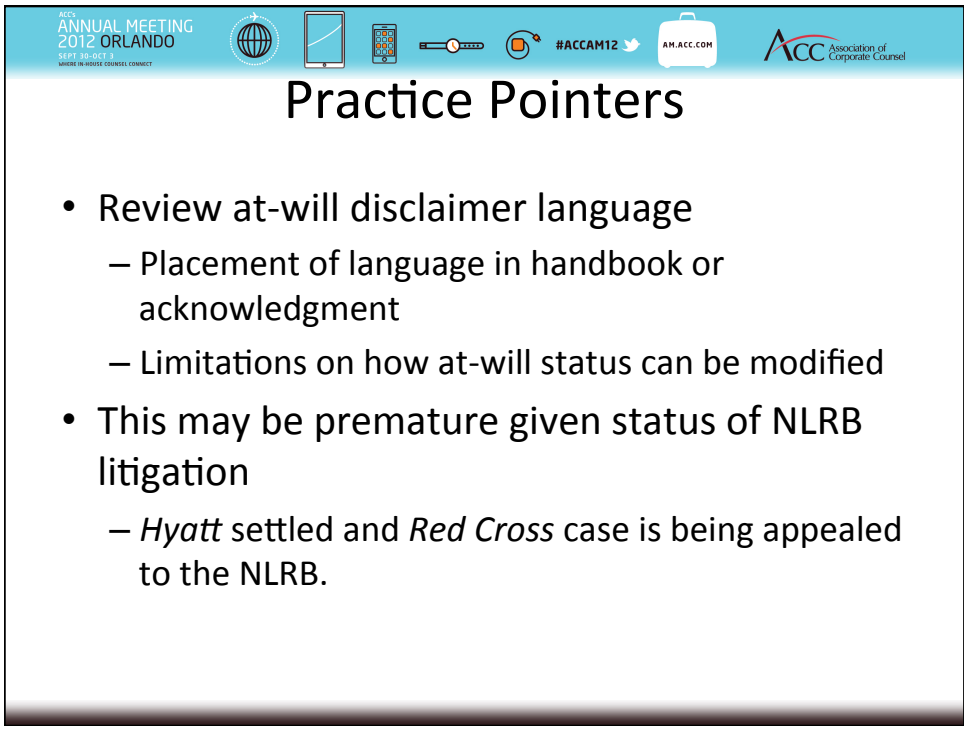


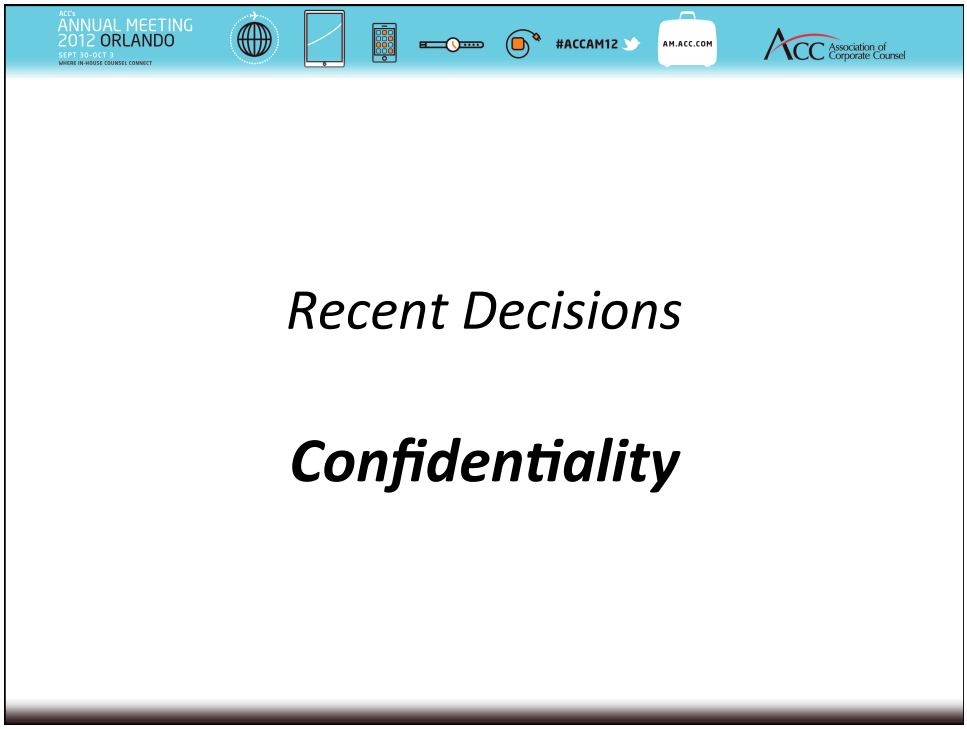


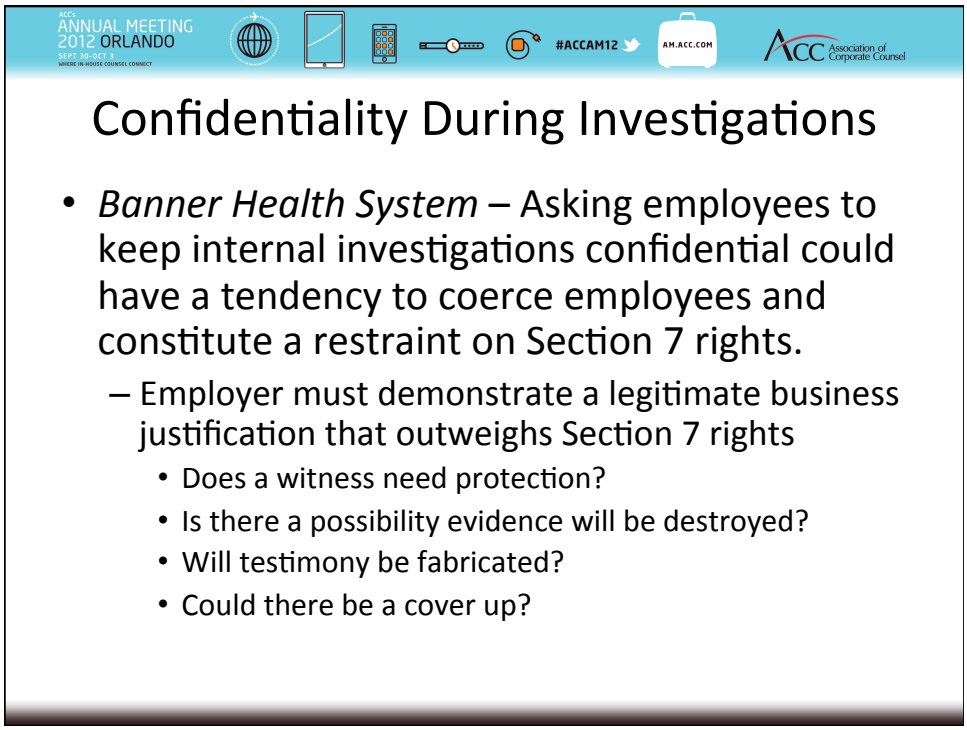


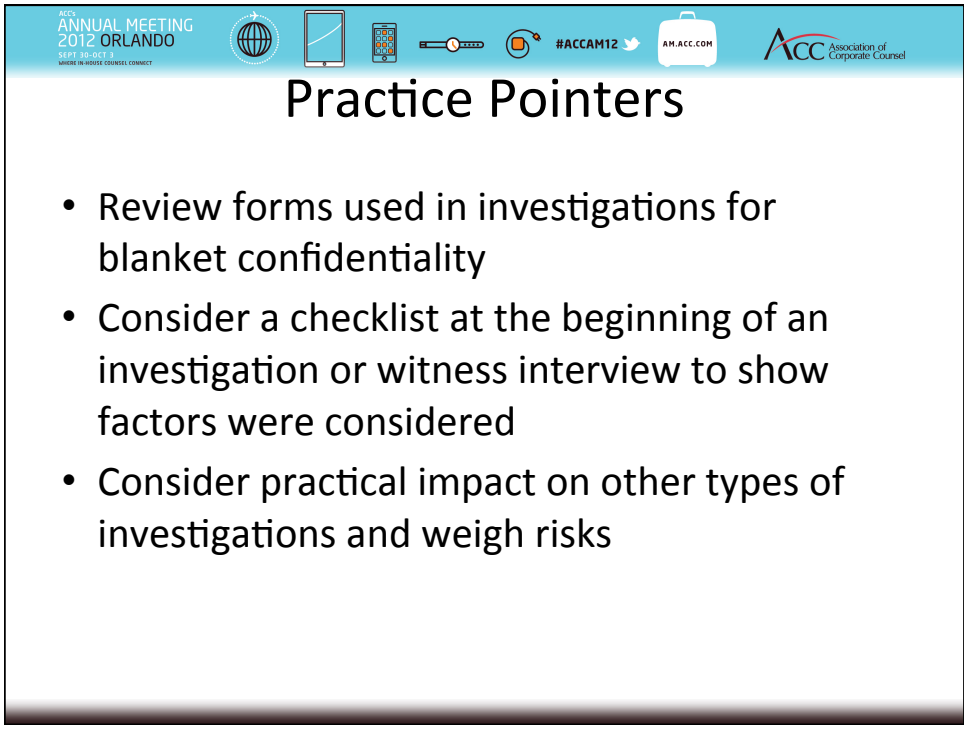


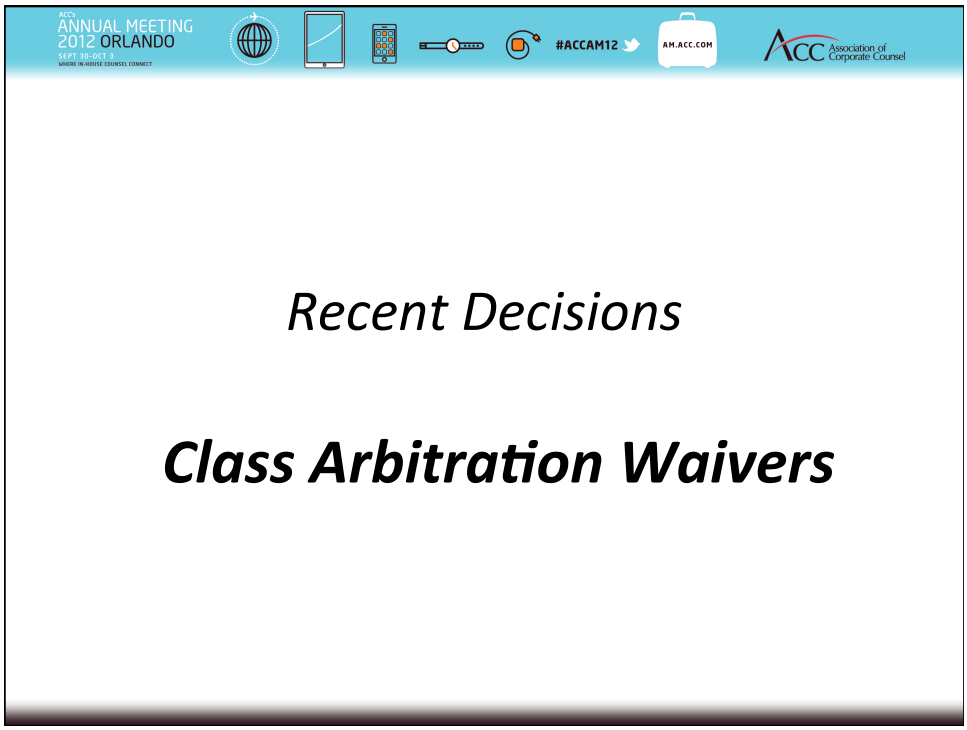


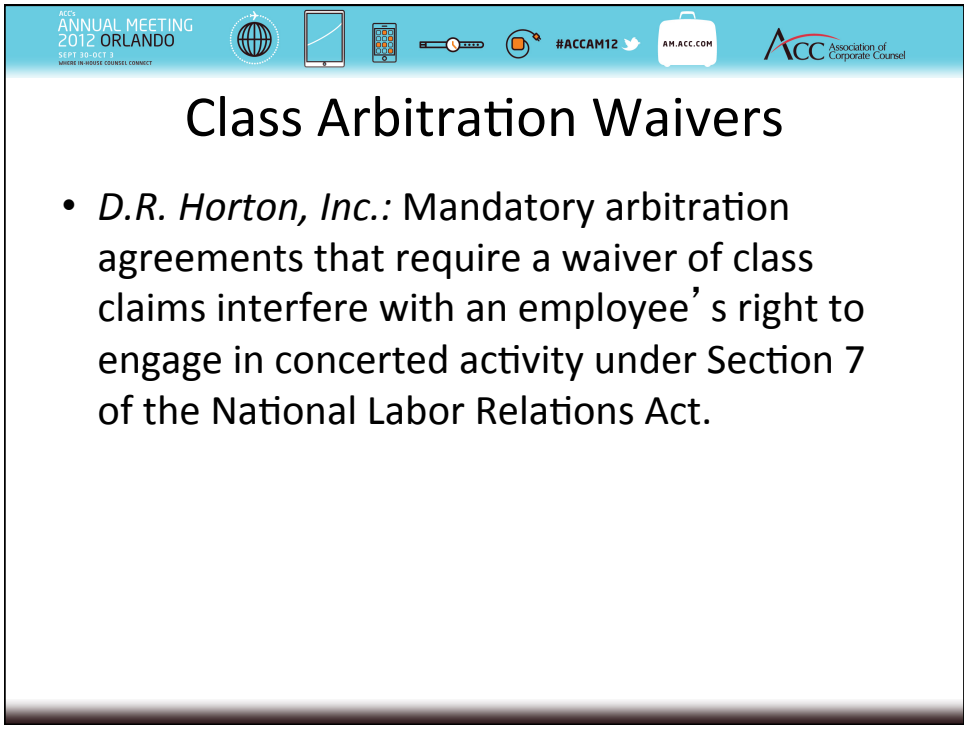


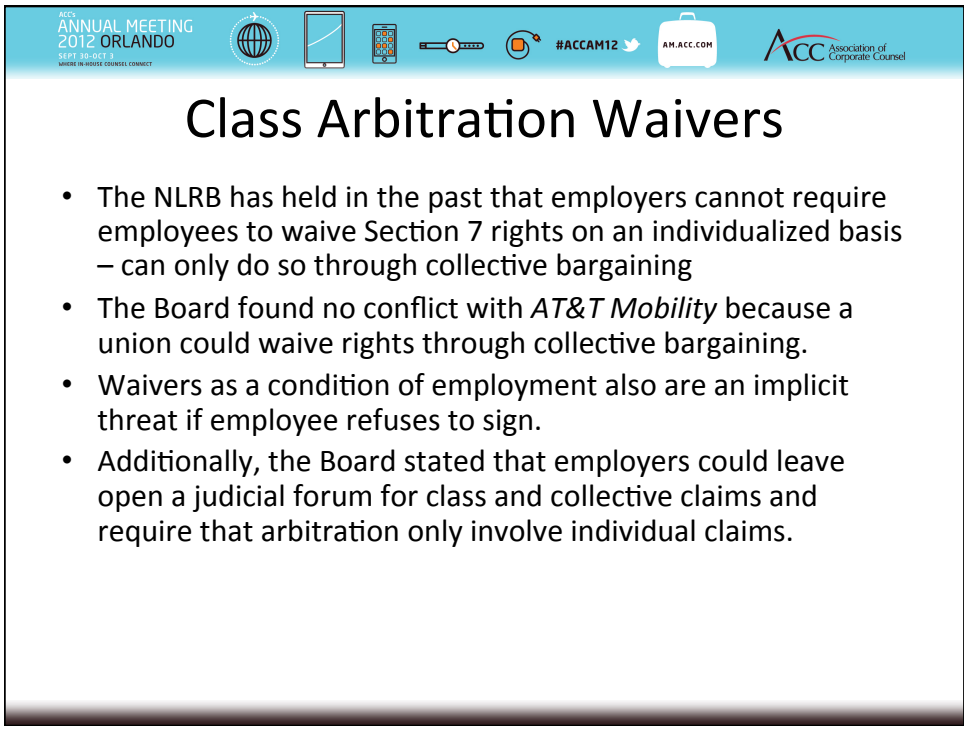


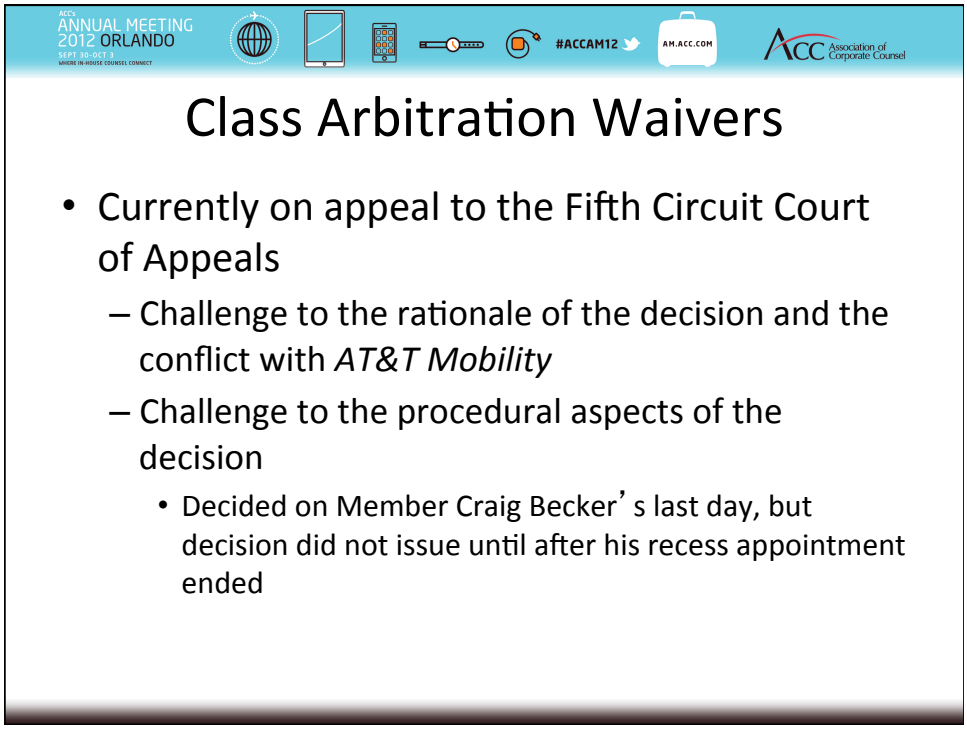


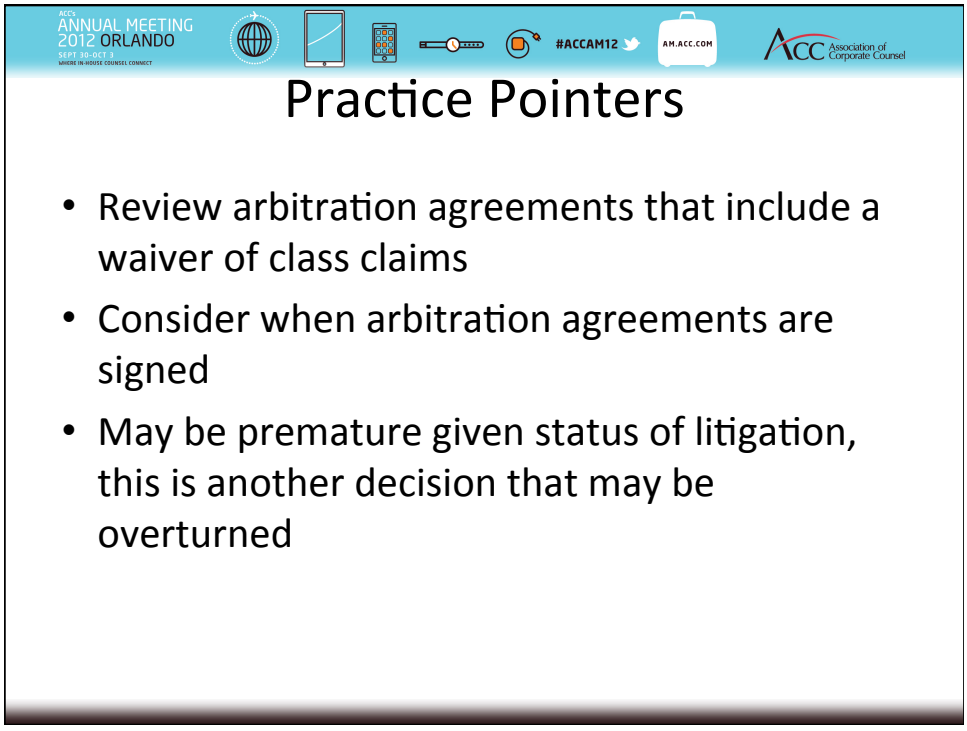


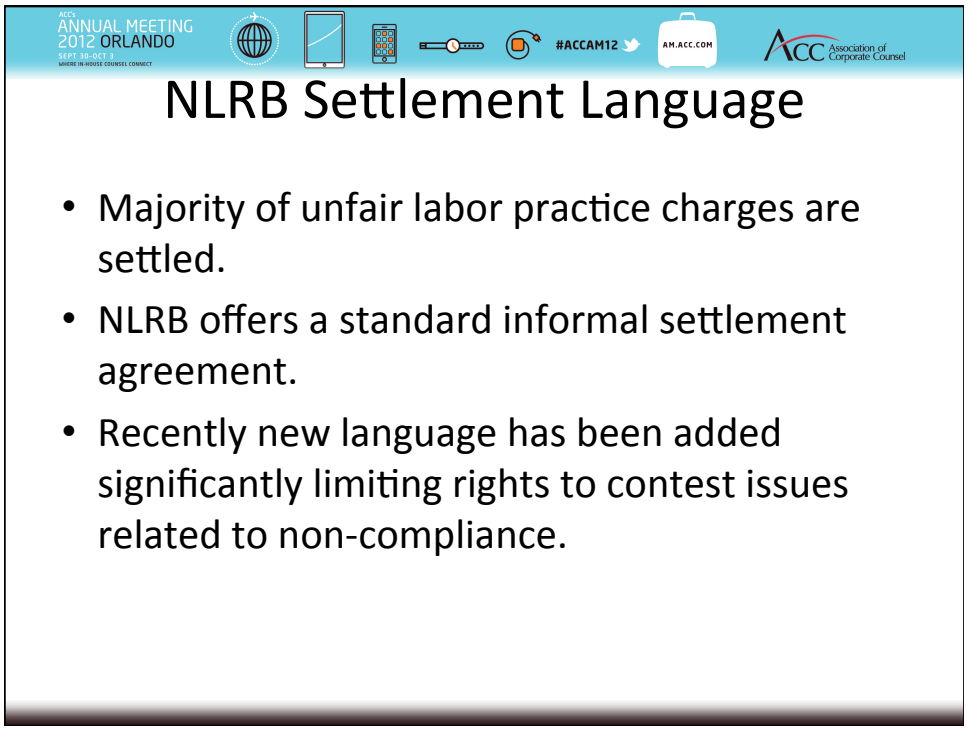


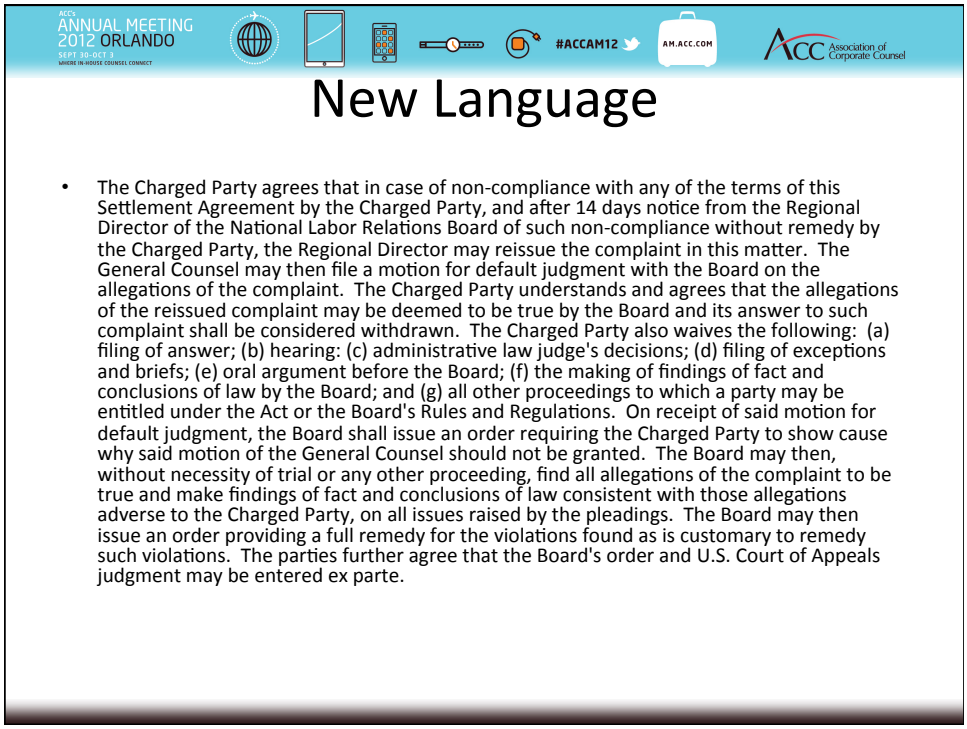


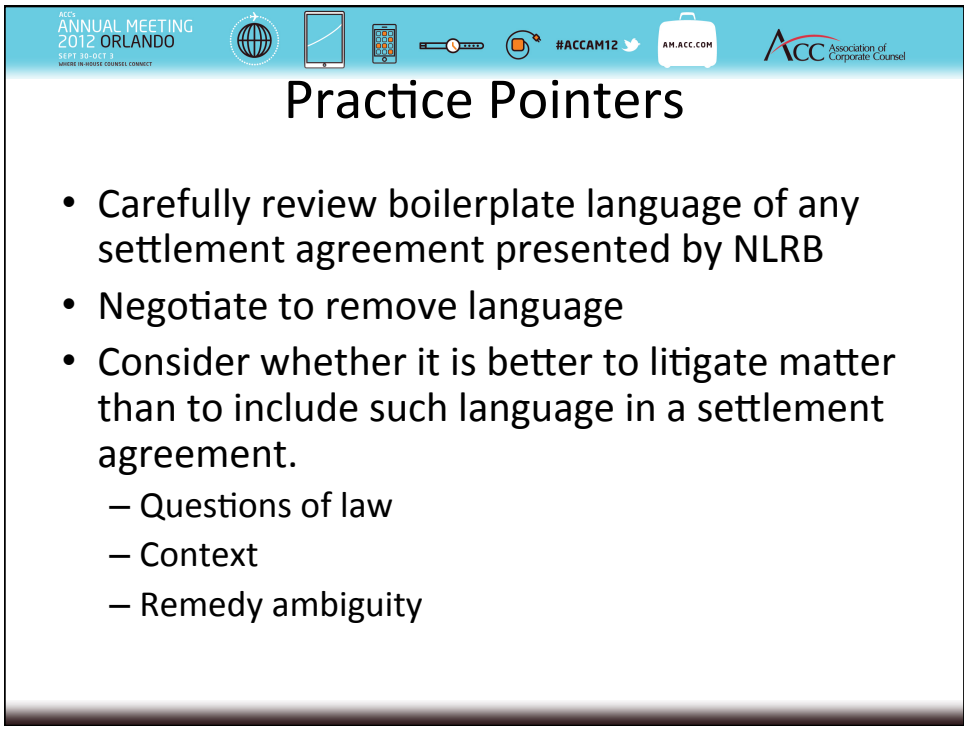












The "New" NLRB: Activist Board Or Rogue Agency?

I. INTRODUCTION

Over the last three years, the National Labor Relations Board has undertaken historic, and in some instances, highly controversial actions. For instance, in its almost eighty-year history, the NLRB has rarely engaged in notice and comment rulemaking, with the last such rulemaking before the current administration occurring in the 1980's. In 2011, however, the NLRB issued two rules, discussed more fully below, that could have a significant impact on employers. In addition, the NLRB has decided a number of cases that fly in the face of established NLRB precedent and has taken a more active role in current issues such as social media. This seminar analyzes the NLRB's recent rule-making, recent decisions of note, NLRB-issued guidance, and provides a sneak peek for where the NLRB may be headed depending on the outcome of the upcoming election.

II. WHAT IS THE NLRB?

The NLRB is a federal agency created by the National Labor Relations Act to handle cases involving the rights of employees who join, or refuse to join, labor unions. Members of the Board are appointed by the President, and approved by the Senate, to staggered five-year terms. The General Counsel, who is the Board's "in-house" lawyer, is appointed to a four-year term in the same manner just described. Published decisions of the NLRB and federal courts provide guidelines governing labor-management relations.

The primary functions of the NLRB include conducting union representation elections and preventing unfair labor practices by unions and employers. A representation election is instigated by the filing of a petition. Unfair labor practice cases are instigated by the filing of a charge. Day-to-day affairs are delegated to the regional, sub-regional, and resident offices. The

agency has 32 regional offices throughout the United States. Each regional office consists of a regional director, regional attorney, staff attorneys, investigators, and support personnel.

A. Current Members

The NLRB has been in a state of flux during the past year. In early January 2012, President Barack Obama announced "recess" appointments to the Board of his three currently-pending Board nominees, two Democrats and one Republican. While this temporarily gave the Board its full compliment of five members: three Democrats and two Republicans, in May of this year, Member Terrence Flynn, a Republican recess appointee, resigned amidst allegations that he had improperly leaked pending case and other information to former Board members. This leaves the current Board with four members:

- **Mark Pearce**, (D) joined the Board in April, 2010, and was appointed as Chairman of the NLRB by President Obama in August, 2011. Pearce was the founder of Creighton, Pearce, Johnsen & Giroux, in Buffalo, NY, where he practiced plaintiff-side labor and employment law. Prior to his career in the private sector, Pearce served several commissions on the New York State Industrial Board of Appeals, where he ruled on wage and hour appeals. His current term on the NLRB ends in August, 2013.
- **Brian Hayes**, (R) joined the Board in June, 2010 and is the former Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor, and Pensions. Prior to joining the Senate, Hayes, represented management in labor and employment matters. His term on the NLRB ends in December, 2012.
- **Sharon Block**, (D) was Deputy Assistant for Congressional Affairs at the U.S. Department of Labor. Before her DOL position, she was an attorney in private practice, an attorney at the Board, Assistant General Counsel at the National Endowment for the Humanities, and Senior Labor and Employment Counsel for the Senate Health, Education, Labor, and Pensions Committee, working for now-deceased Sen. Edward M. Kennedy (D-Mass.). Separately from the "recess" appointment, she was nominated to the NLRB through the normal process on December 14, 2011, but she has yet to be confirmed by the Senate.
- **Richard Griffin**. Richard Griffin (D) was most recently General Counsel of the International Union of Operating Engineers ("IUOE") and a member of the AFL-CIO Lawyers Coordinating Committee. Prior to his lengthy career with the IUOE, he served two years as counsel to the NLRB Board Members. Like Block, Griffin's "normal" nomination to the Board is pending Senate confirmation.

B. Current Legal Challenge

With respect to the latest appointees, characterizing their appointments as "recess" is a bit of a misnomer because Congress was not technically in recess on January 5, 2012, when the President made the appointments. Normally, recess appointments take place when Congress is not in session as a means to fill positions without the need for Senate confirmation. In this case, Republican senators attempted to prevent the recess appointments by holding *pro forma* sessions at least once every three days. Nonetheless, President Obama considered the limited *pro forma* sessions as the equivalent of a recess and proceeded to make the appointments. This triggered a legal dispute regarding the constitutionality of the President's actions and the validity of Board decisions. The constitutional argument revolves around the balance of powers, particularly between the Executive and Legislative branches of the federal government. Because Congress was still in session when the recess appointments were made, it begs the question: who determines when Congress is in session, the Senate or the President? Senator Lindsey Graham (R-SC) also has vowed expressly to block all nominations to the Board until he has a full accounting of what took place at the Board in connection with the recently withdrawn Boeing complaint, which drew much attention in the press. In a December 13, 2011, press release, Sen. Graham said, "[G]iven its recent actions, the NLRB as inoperable could be considered progress." More recently, Sen. Graham has been quoted as saying that he "will continue to do everything in his power to put the brakes on the NLRB as currently constructed." Likewise, in the House of Representatives complaints were easy to find. House Education and Workforce Committee Chairman John Kline (R-MN) stated that "every decision issued by this board will be tainted." Given the current status of the litigation, it likely will be 2013 before any decision is reached.

III. RECENT RULEMAKING BY THE NLRB

A. Rights and Responsibilities Under The NLRA Poster

On August 25, 2011, the NLRB announced a final rule on Notification of Employee Rights under the NLRA. The rule passed the NLRB by a 3-1 vote, with Member Brian Hayes dissenting.

1. Requirements

The rule mandates that employers covered by the NLRA must post a notice to employees informing them of their right to act together to improve wages and working conditions, to form and join a union, to bargain collectively, or to choose not to do any of these things. Employers can request copies of the notice from the NLRB or download copies from the NLRB's website, (www.nlrb.gov).[1] Downloaded copies must be printed on 11x17 inch paper but can be printed in black and white. Employers also can use a commercial poster service as long as the notice maintains the same size, color, and content.

According to the rule, the notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. The employer must take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material, or otherwise rendered unreadable. Employers who maintain internet (or intranet) sites where they "customarily" post or communicate personnel rules or policies to employees must post the notice electronically as well. The employer can either post the actual notice or provide a link to the notice on the NLRB's website.

Employers with a workforce that consists of at least 20% non-English speaking employees must provide a language-specific copy of the notice. Employers can meet this obligation by either providing the notice to the individual employees or posting the notice in the

[1] A copy of the Notice is attached as Appendix A.

required languages. Employers can obtain translated notices from the NLRB and can also request that the NLRB translate the notice into languages not already available.[2]

2. Penalties

The biggest impact of this posting rule for employers are the repercussions if an employer *does not* post the notice.[3] The rule imposes three possible penalties for an employer's failure to post the notice. First, an unfair labor practice charge, although the rule clarifies that in the majority of circumstances, the unfair labor practice will be closed and not pursued further if the employer was unaware of the rule and posts the notice when requested. Second, failing to post the notice could lead to a tolling of the six-month statute of limitations for the filing of unfair labor practice charges. Lastly, an employer's knowing and willful failure to post the notice could be used as evidence of unlawful motive in a separate unfair labor practice charge.

3. Legal Disputes

Originally, the poster rule was scheduled to go into effect on November 14, 2011. But, after litigation was filed seeking an injunction regarding the rule, the NLRB initially pushed the posting date back to January 31, 2012, and then back again to April 30, 2012. Prior to the April 30, 2012 deadline, conflicting decisions issued from two federal district courts.

First, the U.S. District Court for the District of Columbia ruled that the posting requirement was lawful but that certain enforcement mechanisms that were part of the NLRB's regulations related to the posting requirement were unlawful. After that, the U.S. District Court for the District of South Carolina issued a decision, which struck down the posting requirement

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[2] In a small victory for employers, unlike the proposed rule, the final rule does not include the requirement that that employers distribute the notice via email, voice mail, text message, or other electronic communication such as Twitter.

[3] Government contractors and subcontractors who are already posting the Department of Labor notice required by Executive Order 13496 do not have post the NLRB's notice as the language is the same.

altogether. In the decision, *Chamber of Commerce of the United States v. NLRB*, District Court Judge David C. Norton held that the poster rule was unenforceable because the NLRB lacked the authority to require employers to post the notice absent some congressional mandate.

In deciding the case, Judge Norton found that under the plain language of the Act, the poster rule was not "necessary to carry out the" Act. According to his analysis, the Act envisions a "reactive" instead of "proactive" role for the NLRB. Its actions come into play only upon the filing of an unfair labor practice charge or when some question concerning representation arises. He found that the poster rule was a proactive measure fundamentally different from and inconsistent with the NLRB's typical "reactive" role, and while potentially useful to the NLRB's desired goals, the poster rule was not "necessary to carry out the" Act. Moreover, Judge Norton relied on the fact that, unlike at least nine other employment pieces of legislation enacted during the past 75 years which expressly include poster requirements, the NLRA has no language referencing or authorizing notice posting. Finally, Judge Norton held that the NLRB's argument that the poster rule was "filling a gap" in the statute was not a supportable rationale.

On April 17, 2012, just weeks before the poster rule was set to go into effect, the United States Court of Appeals for the D.C. Circuit issued an emergency temporary injunction relieving employers of the duty to comply with the poster rule. The purpose of the injunction is to maintain the "status quo" until the Court decides whether the NLRB has the authority to issue the rule. While the issue on appeal is being heard on an expedited basis, the oral arguments are not scheduled until September 2012; thus, there remains much uncertainty about when, or whether, the rule will go into effect.

4. Practice Pointers

The rule leaves open the option for an employer to post a separate notice on its stance regarding unions. The NLRB acknowledged an employer's right to "express views, arguments,

and opinions" on unionization so long as the employer's expression "contains no threat of reprisal or force or promise of benefit." Before deciding whether to post a separate notice (assuming the posting requirement is ever re-instituted), employers should consider the risk of drawing increased awareness of the notice as well as the level of knowledge of its workforce regarding unions. In some instances, posting of the notice could be used as a springboard to train an employer's workforce regarding the employer's position as to unions. At a minimum, employers should consider training managers and other supervisors on common questions they may receive from employees regarding the notice and the employer's desired response.

B. Modified Election Procedures or "Quickie" Elections

On December 21, 2011, the NLRB released a final rule amending its procedures in union representation cases to limit the issues considered in NLRB hearings, eliminate pre-election review of regional directors' decisions, and take other steps the agency has stated will "reduce unnecessary litigation and delays." This rule, like the poster rule, was set to become effective April 30, 2012.

Chairman Pearce and Member Becker approved the final rule without the agreement of Member Hayes, who opposed the action. Pearce and Becker claimed that, despite Member Hayes' objection, they had the authority to take action. By selecting April 30, 2012, as the effective date for the changes in Board procedure, Pearce and Becker stated that they were giving Hayes a "reasonable period of time to express his views in a timely, formal and public manner."

1. Requirements

While the Final Rule is less onerous than the initial proposal, the critical changes were retained to result in representation elections being scheduled in a much shorter time period. The

key aspects of the Final Rule involve limiting hearings and appeals at the outset of a representation election case. The changes will, among other things, do the following:

1. Limit the purpose of the pre-election hearing to whether there is a question of representation and whether the unit is appropriate. Unit placement issues (such as, whether a particular employee is an exempt supervisor) will be deferred until after the election, should such matters be determinative.

2. Provide hearing officers with the authority to limit the presentation of evidence.

3. Provide hearing officers with the authority to allow post-hearing briefs, set a time period for any such briefs, and limit the evidence introduced at the hearing to that which is relevant to a genuine issue of fact material to whether a question of representation exists.

4. Eliminate the right of a party to file a pre-election request for review following the pre-election hearing. Such requests will now be deferred until after the election and consolidated with the review of any post-election issues and objections.

5. Elimination of the pre-election appeal process will, in turn, eliminate the need for the Board's current practice of scheduling elections no sooner than at least 25 days after a hearing decision and direction of election to allow time for review of a pre-election appeal to the Board. This will effectively mean that an election could be held less than 25 days after a petition is filed.

6. Narrow the circumstances under which special permission will be granted to appeal to the Board and defer until after the election.

7. Create uniform procedures for resolving election objections and determinative challenges in stipulated and directed election cases, and Board review of Regional Director resolutions of such matters is now discretionary.

The provisions of the proposed rule that were not included in the final rule remain viable for future Board action.[4]

2. <u>Legal Disputes</u>

[4] Some of these provisions include allowing a petition to be filed electronically; expanding the information on the *Excelsior* list to include employee telephone numbers, email address, shifts, and job classifications; reducing the amount of time an employer has to provide the *Excelsior* list; and emailing of the Notice of election to employees.

On December 20, 2011, before the NLRB issued the final rule, the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in United States District Court for the District of Columbia seeking to enjoin the NLRB from enforcing the rule. The complaint asserted that the final rule violated the NLRA, exceeded the Board's statutory authority, and was contrary to the First and Fifth Amendments to the U.S. Constitution, which guarantee the rights to free speech and due process. The complaint also challenged the issuance of the final rule with the signature of only two members of the NLRB as "arbitrary, capricious, and an abuse of discretion."[5]

On May 14, 2012, the D.C. District Court ruled that the Board lacked a quorum and had not effectively promulgated the rule. Judge James E. Boasberg held that the Board failed to comply with the three-member quorum requirement of the National Labor Relations Act when it took action late in December, 2011, promulgating the final rule for fast-tracking elections. Under the plain language of the NLRA, as well as the Supreme Court's decision in *New Process Steel, L.P., v. NLRB*, 560 U.S. ____ (2010) (slip opinion), a quorum of three members is necessary for the Board action. Judge Boasberg held that Hayes' membership on the Board at the time did not constitute "participation" in the Board's action. Thus, the Court held that the final rule was not validly adopted and, as a result, must be set aside.

In light of the court's decision, the NLRB issued a notice on May 15, 2012, stating that the Acting General Counsel has advised the Regions to revert to the prior procedures and rules, which can in some circumstances give employers a longer time before elections to campaign

[5] In a similar attempt to derail the final rule, Republicans in the House of Representatives have proposed legislation to limit the Board's discretion in representation case proceedings by requiring a minimum of 14 days before a pre-election hearing on representation case issues and would also prohibit any election less than 35 calendar days after the filing of a petition.

against union representation. Of course, nothing prevents the Board from voting to reinstate the "quickie election" rule with a proper quorum, as Judge Boasberg pointed out.

3. Practical Implications

Should the "quickie election" rule be reissued, employers can expect much shorter turnaround between the filing of a union petition and the election. Accordingly, employers should be prepared to quickly respond to any petitions. As the rule currently stands, regional hearing officers will be given substantial discretion to limit hearing issues. Those issues related to voter eligibility, supervisory status, and unit scope probably will not be heard pre-election because the Regions are likely to decide that they can be addressed by the challenged ballot procedure or be raised in a post-election appeal. Thus, campaigns and elections will be held even though uncertainty exists as to the scope of the unit, who is or is not in the unit, and who is or is not a supervisor. Employees will not know for sure who is in their unit when they vote. Employers will not know for sure who is or is not a supervisor for purposes of campaigning. As a result, an increase in the number of unfair labor practice charges related to alleged supervisory conduct may be the ultimate consequence of limiting hearing issues.

An employer's leverage in getting a date the employer deems acceptable for an election will be gone because the employer cannot bargain away some or all of the hearing issues in order to get the election date it wants. Under current rules, insisting on a hearing effectively ensures an employer at least 32 days to communicate its message to employees once an election is set. As a practical matter, many employers bargain away the hearing issues to get an election date deemed fair.

Employers should be prepared to respond to union organizing efforts. Critical to this preparation is regular, advanced-training of managers and supervisors on the signs of union organizing and the proper response to signs of and inquiries regarding possible union activity.

IV. SOCIAL MEDIA AND SOCIAL MEDIA POLICIES

The topic of social media and the regulation of employee communications via social media websites (e.g. Facebook, LinkedIn, Twitter, etc.) has recently received great attention from the Board. This is evidenced by the fact that the Board has issued three reports in the last year discussing decisions involving social media.

A. How Does the NLRA Apply to Social Media?

The NLRA protects the ability of employees, even non-union employees, who act together in matters related to the terms and conditions of their employment—concerted activity. This can include group activity or even the activity of a single employee, if the employee is acting "on behalf" of the group, "vocalizing sentiments of coworkers," or inciting group action.

Specifically, Section 7 states that "[e]mployees 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C.A. § 157.

B. What is Social Media and Why Does the NLRB Care?

Social media is defined by the NLRB as including "various online technology tools that enable people to communicate easily via the internet [sic] to share information and resources,"

which can encompass text, audio, video, images, podcasts and other communications. Platforms like Facebook, Twitter, and LinkedIn, to name a few, have become extremely popular components of today's online culture. Social media sites like these, allow users 24/7 access to other social media companions. Because of its ease of use, users of social media use the various platforms to communicate any nature of things including news articles, photos, and anything else on their minds—including commentary related to their employment.

Accordingly, employers have sought to restrict the types of comments (mostly when harmful or disparaging in nature) their employees are allowed to make about their employers; and in some cases have used them as grounds for termination. The NLRB, catching wind of employees' discontent with overly broad social media policies, has also become involved citing the potential Section 7 obligations of employers regarding the regulation of employee speech as grounds for regulation of employer policies. The Board's interest on the topic, to date, has prompted Lafe Solomon, the Board's acting General Counsel, to issue three reports regarding employers' use and enforcement of social media policies. The basic conclusions of the three reports are foggy at best, and explained in more detail below.

C. The First Report - August 18, 2011

The first report was prompted because the NLRB had received, over the past five years, over 100 complaints regarding social media policies and practices. The report adopted a very broad stance with regard to social media practices as protected, concerted activity under Section 7; likewise the report highlighted several components of social media policies which it holds to infringe on employees' Section 7 rights. These are the notable take away points:

- The NLRB repeatedly mentions that social media policies that would prevent employees from picketing while wearing or displaying company logos (or posting pictures of such a protest) are unlawfully overbroad. Thus, be wary of blanket

prohibitions on using the Company's logo or posting photographs of business locations.

- A media policy that "seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to effect that result" does not restrict Section 7 activity. A blanket prohibition against all employee contact with the media is, however, unlawful according to the NLRB.

- A policy may not prohibit employees from making any and all disparaging comments about the company, supervisors or coworkers, as that might "chill" employees in their exercise of Section 7 rights.

- "Individual gripes" – as contrasted with concerted activity – are not protected, nor is it protected when an individual is attempting to make the public at large aware of company "problems."

- Swearing and sarcasm do not automatically cause a communication to lose its protected status, so long as the posts are not "opprobrious" (disgraceful, grossly wrong).

Upon first reading of this report, lawyers nationwide had concluded that the inclusion of a "Section 7 Disclaimer" would save a social media policy from being classified as unlawful. However, the more recent reports have erased the notion.

D. The Second Report - January 24, 2012

The NLRB's second venture into the world of social media muddied the waters considerably, as many neutral-appearing provisions were found to have an unlawful "chilling" effect on the exercise of Section 7 rights. Although the report indicated that a policy with specific guidance (such as, examples about what types of communications are prohibited), is more likely to be upheld, general prohibitions of "inappropriate" or "disparaging" comments is not specific enough to avoid Section 7 implications. In addition, even "lawful" terminations for violations of social media policies are problematic under the NLRB rules. The Board also highlighted several policy provisions which it deemed either lawful or unlawful, including:

- Types of policy provisions that the NLRB found to be **unlawful**:

- Prohibition against disclosing confidential, sensitive or non-public information concerning the company was overly broad (even though policy only prohibited disclosures made on or through company property) as it could have a chilling effect on discussion of wage/hour concerns.

- Requirement that social networking communications be made in an honest, professional and appropriate manner and without defamatory comments regarding the employer was overly broad.

- Prohibition against discriminatory, defamatory, or harassing posts about employees, work environment or work-related issues was overly broad.

- Requirement that employees needed approval to identify themselves as employees of company and that all comments must state they are the personal opinions was "particularly harmful" to Section 7 rights, and would be overly burdensome on employees.

- Types of policy provisions that the NLRB found to be **lawful**:

  - Provision that employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws was lawful, as employees would construe that to address only communications related to security regulations. Provision in the same policy that prohibits employees from using or disclosing confidential and/or proprietary information, including protected health information or discussing "embargoed information" was also lawful.

  - Prohibition of the use of social media to make comments about employer or coworker that are vulgar, obscene, threatening, intimidating, harassing or a violation of the employer's workplace policies against discrimination based on a protected class was found to be lawful.

  - Provision under "Promotional Content" heading that employees must indicate their views are their own, and prohibiting publication of promotional content was lawful, as it was supposedly clear to employees that it only referred to promotional/advertising content.

E. The Third Report - May 30, 2012

The NLRB's third report focused mainly on social media policies and – if anything – is even less helpful than the second report. The report included analysis of several recent social

media policy Board cases which involving policies, or clauses of policies, where were in violation of the NLRA. The following provisions were deemed to be unlawful:

- Selected policy provisions that the NLRB found to be **unlawful**:
  - Clause reading: "Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."
  - Clause reading: "Remember to communicate in a professional tone … this includes … proper consideration of privacy and topics that may be considered objectionable or inflammatory – such as politics and religion."
  - Blanket prohibitions on all contact with media were unlawful.
  - Blanket prohibition on talking to government agencies, "particularly the NLRB."

The report also indicated that Section 7 "savings clauses would not act to shield an employer from any violations resulting from unlawful provisions contained in social media policies. However, the report did prove to have a bit of a silver lining because it provided, in full, an example of a social media policy (Wal-Mart) which it found compliant. The Wal-Mart policy has now become the "gold-standard" for NLRB compliant social media policies.[6]

While the General Counsel's third letter provides some guidance for employers it comes with several caveats. First, employers need to be aware that, although the three reports represent the Board current enforcement position on social media, they are not law and have not been tested in federal court. Second, the Wal-Mart policy referenced in the third report is one example, not the *only* example, of what a lawful social media policy can look like. The idea of a "one-size-fits-all" policy is not realistic for all employers and types of businesses. Third, employers should provide training to the managers who may be the individuals to respond to employee issues involving social media. These managers need to know how to address concerns

[6] A copy of the Third Guidance, with the Wal-Mart policy is attached as Appendix B.

related to social media and when an employee may be disciplined for something they posted electronically. Finally, the General Counsel's stated aggressive enforcement approach is a warning to heed and employers should have their social media policies reviewed.

F. Legal Disputes – Practice Pointers

Cases directly discussing the lawfulness and breadth of social media policies are rare. Despite this fact, controversies will continue to arise until, eventually, a court issues some guidance on the issue of social media policies. In the meantime, the handful of court decisions that currently exist suggest the following principles:

- **Employers can tell employees that they have no expectation of privacy on company equipment or accounts.** Courts across the country – even up to the Supreme Court – have found that when an employer states that it reserves the right to inspect or monitor all employees' use of the Internet and e-mail messages, the employee is on notice and has no legitimate expectation of privacy.

- **Employers may discipline an employee for violating Internet or social media policy.** State courts in Pennsylvania and Minnesota, and a federal court in Texas, have found that an employee's violation of Internet policies – typically for actions like sending or storing sexually graphic e-mails – was an appropriate grounds for termination. This suggests it's fair to treat online violations of your policies the same way that you treat offline violations.

- **Social media is admissible evidence of sexual harassment or discrimination.** An employee's Facebook account is discoverable in litigation. Accordingly, if a manager posted a harassing remark on a subordinate's blog and the subordinate made you aware of it, some jurisdictions may hold you responsible for it based on the theory that it contributes to a hostile work environment. Because the Internet is constantly archived, your manager's remark will almost certainly come back to haunt you in litigation.

V. RECENT DECISIONS

The above section addressed developments and legal ramifications stemming from the NLRB's recent round of rulemaking, this section highlights recent developments and/or trends coming from Board decisions themselves. Most notably, are the potential for "micro bargaining units" and the implications of at-will employment disclaimers.

A. Micro Units

In late August, 2011, the Board issued a decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which overturned the 20 year standard for bargaining unit determinations. The decision certified a group of 53 Certified Nurses Assistants (CNAs), rather than the much larger unit sought by the employer, finding the CNAs alone constituted an appropriate bargaining unit. The Board held that an employer challenging a proposed bargaining unit on the basis that it improperly excludes certain employees is required to prove that the excluded workers share "an overwhelming community of interest" with those in the proposed unit.

The implications of the "overwhelming community of interest" standard, as argued, were that the standard allows potentially every unique job classification a viable bargaining unit. Currently the case is being argued before the Sixth Circuit Court of Appeals. and if upheld could have widespread implications and potentially "open the floodgates" to the formation of micro bargaining units.

Since the NLRB's ruling in the *Specialty Healthcare* case, it has approved micro-unions including maintenance workers at a Nestlé SA Dreyer's ice cream plant in California, car rental employees of Dollar Thrifty Automotive Group Inc. in Nevada, and department store shoe sales clerks at a Bergdorf Goodman retailer in New York. The Regional director in the Bergdorf Goodman decision approved shoe sales associates request because, "requires a distinct skill set from other sales associates due to the unique nature of the product they are selling. If a shoe is not sized appropriately for a customers, discomfort and possible knee, back and other physical injuries could result." The Board has recently approved the appeal request of Nieman Marcus Group, which owns Bergdorf Goodman, and is currently awaiting the parties' briefs. The

National Retail Federation and several other business groups have filed amicus briefs in support of Nieman Marcus.

The outcome of these cases will have a determinative impact on whether the traditional bargaining unit determinations will dissolve. If upheld these decisions could have widespread implications and potentially "open the floodgates" to the formation of micro bargaining units.

B. Handbook Disclaimer

A recent settlement with Hyatt Hotels Corp., and an Administrate Law Judge's ("ALJ") decision against American Red Cross, suggest that certain employment at-will disclaimers may be in violation of the NLRA. The disclaimers at issue were found to be in violation of the Act because they were considered to be overly-broad and could potentially chill employees' Section 7 rights.

The employment at-will disclaimers found to be in violation of the NLRA were standard disclaimers commonly used in employment handbooks and acknowledgement forms. In *NLRB* v. *Hyatt Hotels Corp.*, 28-CA-061114 (Feb. 2012) the General Counsel alleged that a provision in Hyatt's employee handbook acknowledgment form was overly-broad and tended to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. The provision states "I understand my employment is 'at will.'... I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operation Officer or Hyatt's President." The parties settled in May of 2012 without any formal ruling or guidance with Hyatt agreeing to suspend such overly-broad provisions in its acknowledgment forms.

Similarly, in *NLRB v. American Red Cross*, 28-CA-23443 (Feb. 2012), the ALJ held that the employer's acknowledgement form which states, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way," would reasonably tend to chill employees in the exercise of their Section 7 rights. The ALJ opined that such a provision constituted a waiver in which employees agreed that their at-will status cannot change and thereby relinquishing their rights to engage in concerted activity, including engaging in union representation and/or a collective-bargaining agreement. As a result, the ALJ held that such a disclaimer is overly-broad, discriminatory and in violation of Section 7.

1. Practical Considerations

With these two cases, the Board seems to say that there is no problem telling employees that they are employed on an at-will basis. However, the problem may arise when employees are told that they can never change their status. Although both cases were from the Board's Arizona Regional Office, employers in other jurisdictions should be concerned as well because these two cases have the potential to affect many employers since similar disclaimers are often found in employment handbooks, acknowledgement forms and employment applications nationwide.

In "at-will" states where such disclaimers are not needed in employee handbooks or other documents, employers may want to consider modifying such statements, or weighing whether the statement truly is even needed. Many states, however, have abrogated the doctrine of employment at will, creating public policy exceptions and new employee rights. In these states, employers may feel the need to have a strong disclaimer emphasizing employment at will. In these states, employers can either wait and see if such holdings are upheld in the courts or they can act proactively and modify their employment at-will policies at this point in time.

C. Mandatory Arbitration Agreements

In the first week of 2012, a two-member panel of the NLRB, in *D. R. Horton, Inc.*, 357 NLRB No. 184, concluded that mandatory arbitration agreements which required employees individually to waive the right to pursue claims on a class basis interfered with employees' rights to engage in concerted activity under Section 7 of the NLRA. The decision is significant for a number of reasons, not the least of which is the fact that the employer was non-union.

According to the Board panel consisting of Chairman Pearce and Member Becker, who was in his last day of a recess appointment (the decision was not actually *issued* until after Becker was gone), an employee's right to join in the concerted activity of filing a class lawsuit or claim was a substantive right within the Act's protection. The Board panel found that nothing in the Federal Arbitration Act ("FAA") insulated arbitration agreements from established principles under the NLRA. Member Hayes was recused and did not participate.

D. R. Horton, Inc., a non-union homebuilder based in Florida, required its employees to sign arbitration agreements. The agreement provided that an arbitrator could "hear only Employee's individual claims and does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding."

A superintendent of the company tried to arbitrate class claims under the Fair Labor Standards Act, and the employer blocked the effort based on the prohibition on class claims in the arbitration agreement. The superintendent then filed an unfair labor practice charge asserting, among other things, that the agreement interfered with his Section 7 right to file a class claim and to file an unfair labor practice charge with the Board. The Board issued a complaint. An administrative law judge found that the prohibition of class claims did not violate the NLRA, although he found that the agreement unlawfully led employees to believe that they could not file

charges with the Board. The Board's Acting General Counsel, Lafe Solomon, filed exceptions to the class claim finding, and Pearce and Becker found that the class claim prohibition violated the NLRA.

The two-member Board panel noted that the Supreme Court had determined that the Section 7 right to engage in protected activity included the right to file proceedings in court or in an administrative forum. The panel said the same applied to arbitration. According to the panel, class or collective actions "are at the core of what Congress intended to protect by adopting the broad language of Section 7." The panel noted that the Board had held in the past that employers could not secure agreements to waive Section 7 rights on an "individualized" basis but could do so only through collective bargaining. The panel also noted that, where an employee was required to execute a waiver as a condition of employment, there was an implicit threat that the employee would be fired or not hired if he or she refused to sign.

Applying those principles to this case, the panel found that the arbitration agreement waived the employees' right to bring class or collective actions in any forum. Because the employer was non-union, the agreements were not entered into through collective bargaining. The agreements were also required as a condition of employment. Accordingly the panel, reversing the ALJ's decision, found that the agreements were unlawful and that the employer, in mandating the agreements, violated Section 8(a)(1) of the NLRA because the agreements restricted Section 7 activity by prohibiting a class or collective action in any forum. The panel made no mention of the Section 7 right of employees "to refrain" from collective activity, a right potentially affected by a class or collective action. (Although it should be noted that an employee has the right to "opt out" of a class action, and must affirmatively "opt in" to be part of a collective action.)

The Supreme Court has taken an expansive view of the Federal Arbitration Act in two strongly pro-arbitration recent cases, *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). Although the NLRB's decision seems to conflict with the broad policy underlying the FAA and these Supreme Court decisions, Pearce and Becker found that there was no conflict. The panel said that the NLRA applied to arbitration agreements, just as it did to other contracts, and noted that no individual contract required as a condition of employment for an employee covered by the Act could waive the Section 7 right to pursue claims on a class or collective basis. On the other hand, the panel noted that a collectively-bargained waiver could be valid because the involvement of the union in that situation stemmed from an exercise of Section 7 rights (that is, the collective-bargaining process).

Pearce and Becker said that their ruling was limited:

> ...we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without the availability of class wide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

There are questions about the timing of the decision, made on Becker's last business day after his recess appointment expired and not issued until January 6, 2012, three days after the Board had lost the three-member quorum required for Board action under the Supreme Court's recent decision in *New Process Steel*, 560 U.S. ___ (2010). A newly-constituted Board would be free to change course and create a new rule, but political observers see no chance of that as long as President Obama controls the nominations and appointments to the five seats on the Board. As noted above, the President's authority to make his latest "recess" appointments is in question.

Currently, the *D. R. Horton* decision is on appeal before the Fifth Circuit Court of Appeals. If upheld, the next step would be to take the case to the Supreme Court. This process could take years, and in the meantime, employers are left with uncertainty. Until further clarity can be obtained, employers will need to balance the benefits of arbitration agreements containing class and collective action waivers against the risks associated with a potential NLRA violation.

D. Whistleblower Protections

Recently, the Board has attempted to expand the rights of employees who have whistleblower protection under statutes such as the Fair Labor Standards Act, the Family Medical Leave Act, and the Dodd-Frank Act. Because employees may be acting together or on behalf of others, the Board reasons, complainants under any of those statutes may also have protections under the NLRA.

In *47 Old Country, Inc.*, 29-CA-30247 (April, 2012), an employer of several employees who had filed collective wage-and-hour complaints, implied that he was watching the employees, disciplined them, informed them the company may go out of business, and eventually terminated one employee. The Board held that the fact the employees were protected by the whistleblower provisions of the Fair Labor Standards Act was irrelevant, because they were clearly engaged in conduct protected by the NLRA. This decision essentially invites whistleblower employees to forum shop—and choose the NLRB—for the most employee-friendly forum.

VI. GENERAL COUNSEL INITIATIVES

From time to time, the Office of the General Counsel issues Guidance Memorandums to its Regional Offices as to policies of particular import to the agency. Some of the memos issued

by Acting General Counsel Solomon over the last few years demonstrates the NLRB's aggressive posture.

A. Injunctive Relief

In a September 30, 2010, memo, the NLRB announced new procedures and timelines aimed at expediting federal court injunctions under Section 10(j) of the Act in cases that involve unlawful discharges during union organizing efforts. Acting General Counsel Solomon said that an employer's unlawful firing of an active union supporter during an organizing drive "means not only that the negative message from the unfair labor practices persists, but also that the remaining employees are deprived of the leadership of active and vocal union supporters." Solomon also observed that "with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board." In such situations, a resumption of union activity is unlikely and the eventual Board order "is ineffective to protect rights guaranteed by the Act," he said.

The memo described the "optimal timeline" for processing these cases and the procedures to ensure timely processing. Within 14 days after the filing of a charge, where the evidence "points to a *prima facie* case on the merits," the respondent will be notified that the NLRB is considering a request for Section 10(j) injunctive relief for the employee's interim reinstatement and that a position statement on that issue should be submitted within seven days. The Regional Director is expected to make a determination on the merits of the case within 49 days from the filing of the charge. If the case has merit, a decision for Section 10(j) relief should be made at the same time. The Board's General Counsel will personally review and decide whether the 10(j) relief should be authorized in all such cases.

According to Solomon, neither the disinterest of an employee in reinstatement nor a union's abandonment of its organizing efforts is considered a ground for declining to seek Section 10(j) relief. "A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights," Solomon said. "A court order offering interim reinstatement may cause the resumption of employee interest with a previous or new union, whether or not the offer is accepted." The Board will keep statistics to see whether the new approach really works and, according to Solomon, the procedure could be expanded to other types of 10(j) cases.

B. Administrative Procedures

Solomon also announced that he expects the Board's Regional Offices to seek effective remedies for serious employee unfair labor practices committed during union organizing campaigns related to threats, promises, interrogations and other unlawful conduct that has a serious impact on employee free choice. He has told the Regional Offices it may be appropriate to request, from the Board and federal courts, orders requiring employers to read NLRB remedial notices to employees, give unions access to employer bulletin boards and disclose employee names and addresses well before the time the traditional *Excelsior* list is required.[7] According to Solomon, employer unfair labor practices may often require a union to "restart" an organizing drive. Providing union access to names and addresses at an earlier date, or for a longer period of time than required by *Excelsior*, may assist in neutralizing the effects of an employer's coercion.

Solomon has also told the Regional Offices that when it is determined that an employer's unfair labor practices have had a severe impact on employee-union communications and union bulletin board access would be inadequate to permit a fair election, the Region should submit the

[7] The *Excelsior* list is a listing of the names and addresses of potential voters that the employer must provide to the union once the details of a union election have been stipulated.

case to the Board's Division of Advice with a recommendation for additional remedial measures. This could include granting a union access to non-work areas during non-work time, giving a union equal time and facilities to respond to any address made by the employer regarding the issue of representation, and affording the union the right to deliver a speech to employees before any Board election.

These potential extraordinary remedies during organizing efforts will significantly alter the landscape over which employers must travel during union organizing campaigns.

C. Deferral To Arbitration Decisions

For many years the NLRB has recognized arbitration decisions as an alternative method for resolving unfair labor practice charges where the issues under the labor agreement coincide with the alleged unfair labor practice. In another Memorandum, Acting General Counsel recommended that the Board adopt a new framework for determining whether to defer to arbitration decisions in unfair labor practice cases brought under the NLRA.

After a review of deferral cases, Solomon claims that the Board needs to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases. Specifically, he says, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have been adequately considered by the arbitrator. This position should apply not only to discipline and discharge cases, but also to other conduct prohibited by Section 8(a)(1) that is addressed in a grievance under a labor agreement. Solomon also will urge the Board to require that the party seeking the deferral bear the burden of showing that the Board's standards have been satisfied. This would include showing that the statutory issue was presented to the arbitrator and that the arbitrator correctly enunciated and applied the statutory principles.

Solomon said that consistent with his position on deferral to arbitration awards, he will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence shows that the parties intended to settle the unfair labor practice charge as well as the grievance. While no such rule has been adopted, employers should note the Board's closer scrutiny in determining whether to defer an unfair labor practice case to arbitration.

VII. CONCLUSION

As the above sections illustrate, the current Board aggressively expanded its reach over the past few years. From the employer's perspective, the Board's enactment of the Poster Rule and the changes to bargaining unit requirements by the *Specialty Healthcare* decision signal its encouragement and protection of organizing efforts. From the standpoint of unions and employee advocates, however, these rules, as well as the Board's recent guidance on social media, its decisions expanding whistleblower protections, and its decision regarding private arbitration agreements, are nothing more than an appropriate application of the NLRA. Certainly, the Board is sending a clear pro-employee message. Employers, including non-union employers, should take heed and consider analyzing how they regulate their workforce in the face of potential Board scrutiny.

APPENDIX A

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011

APPENDIX B

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-59 May 30, 2012

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Report of the Acting General Counsel Concerning Social Media Cases

Attached is an updated report from the Acting General Counsel concerning recent social media cases.

/s/
A. P.

Attachment

cc: NLRBU
Release to the Public

REPORT OF THE GENERAL COUNSEL

In August 2011 and in January 2012, I issued reports presenting case developments arising in the context of today's social media. Employee use of social media as it relates to the workplace continues to increase, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns. These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies.

My previous reports touched on some of these policies and rules, and they are the sole focus of this report, which discusses seven recent cases. In the first six cases, I have concluded that at least some of the provisions in the employers' policies and rules are overbroad and thus unlawful under the National Labor Relations Act. In the last case, I have concluded that the entire social media policy, as revised, is lawful under the Act, and I have attached this complete policy. I hope that this report, with its specific examples of various employer policies and rules, will provide additional guidance in this area.

/s/
Lafe E. Solomon
Acting General Counsel

Rules on Using Social Media Technology and on Communicating Confidential Information Are Overbroad

In this case, we addressed the Employer's rules governing the use of social media and the communication of confidential information. We found these rules unlawful as they would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

As explained in my previous reports, an employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. See Tradesmen International, 338 NLRB 460, 460-462 (2002).

The Employer in this case operates retail stores nationwide. Its social media policy, set forth in a section of its handbook titled "Information Security," provides in relevant part:

> **Use technology appropriately**
>
> * * * * *
>
> **If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. . .**

- **Don't release confidential guest, team member or company information. . . .**

We found this section of the handbook to be unlawful. Its instruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7. The Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other and that rules prohibiting the communication of confidential information without exempting Section 7 activity inhibit this right because employees would reasonably interpret such prohibitions to include information concerning terms and conditions of employment. See, e.g., Cintas Corp., 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007).

The next section of the handbook we addressed provides as follows:

Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:

- **Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.**
- **Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.**
- **Watch what you say. Don't have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.**

Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information. . . .

We're serious about the appropriate use, storage and communication of confidential information. A violation of [Employer] policies regarding confidential

> **information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.**

We found some of this section to be unlawful. Initially, we decided that the provisions instructing employees not to share confidential information with co-workers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places are overbroad. Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places--virtually everywhere such discussions are most likely to occur.

We also found unlawful the provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likewise unlawful.

We did not, however, find unlawful that portion of the handbook section that admonishes employees to "[d]evelop a healthy suspicion[,]" cautions against being tricked into disclosing confidential information, and urges employees to "[b]e suspicious if asked to ignore identification procedures." Although this section also refers to confidential information, it merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications. Further, when the Employer rescinds the offending "confidentiality" provisions, this section would not reasonably be construed to apply to Section 7 activities, particularly since it specifically ties confidential information to "identification procedures." [Target Corp., Case 29-CA-030713]

Several Policy Provisions Are Overbroad, Including Those on 'Non-Public Information' and 'Friending Co-Workers'

In this case, we again found that certain portions of the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

The Employer--a motor vehicle manufacturer--maintains a social media policy that includes the following:

> USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE
> If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer's media] site. If you are still in doubt, don't post. Non-public information includes:
> - Any topic related to the financial performance of the company;
> - Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;
> - [Employer] Secret, Confidential or Attorney-Client Privileged information;
> - Information that has not already been disclosed by authorized persons in a public forum; and
> - Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.
>
> When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.
> - Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.
> - Get permission before posting photos, video, quotes or personal information of anyone other than you online.
> - Do not incorporate [Employer] logos, trademarks or other assets in your posts.

We found various provisions in the above section to be unlawful. Initially, employees are instructed to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site." The term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of,

the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further found unlawful the portion of this provision that instructs employees not to "reveal non- public company information on any public site" and then explains that non-public information encompasses "[a]ny topic related to the financial performance of the company"; "[i]nformation that has not already been disclosed by authorized persons in a public forum"; and "[p]ersonal information about another [Employer] employee, such as . . . performance, compensation or status in the company." Because this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

The section of the policy that cautions employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea[,]" is also unlawful. The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See Brunswick Corp.,282 NLRB 794, 794-795 (1987).

The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared, and from using the Employer's logos and trademarks. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo. Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees' non-commercial use of the Employer's logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

We found lawful, however, this section's bulleted prohibitions on discussing information related to the "safety performance of [Employer] systems or components for vehicles" and "Secret, Confidential or Attorney-Client Privileged information." Neither of these provisions refers to employees, and employees would reasonably read the safety

provision as applying to the safety performance of the Employer's automobile systems and components, not to the safety of the workplace. The provision addressing secret, confidential, or attorney-client privileged information is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information.

We also looked at the following provisions:

> **TREAT EVERYONE WITH RESPECT**
> **Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.**
>
> **OTHER [EMPLOYER] POLICIES THAT APPLY**
> **Think carefully about 'friending' co-workers . . . on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.**
>
> **[Employer], like other employers, is making internal social media tools available to share workplace information within [Employer]. All employees and representatives who use these social media tools must also adhere to the following:**
>
> - **Report any unusual or inappropriate internal social media activity to the system administrator.**
>
> **[Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).**

As to these provisions, we found unlawful the instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." Like the provisions discussed above, this provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees. Similarly, the instruction to be aware that "[c]ommunications with co-workers . . . that would be inappropriate in the workplace are also inappropriate online" does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The provision of the Employer's social media policy instructing employees to "[t]hink carefully about

'friending' co-workers" is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

We also found unlawful the policy's instruction that employees "[r]eport any unusual or inappropriate internal social media activity." An employer violates the Act by encouraging employees to report to management the union activities of other employees. See generally Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998) and cases cited at n.6. Such statements are unlawful because they have the potential to discourage employees from engaging in protected activities. Here, the Employer's instruction would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful, as set forth above, the reporting requirement is also unlawful.

Finally, we concluded that the policy's "savings clause," under which the Employer's "Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)," does not cure the ambiguities in the policy's overbroad rules. [General Motors, Case 07-CA-053570]

Guidelines on Privacy, Legal Matters, Online Tone, Prior Permission, and Resolving Concerns Are Overbroad

In this case, we again found that some of the Employer's social media guidelines were overly broad in violation of Section 8(a)(1)of the Act.

The Employer is an international health care services company that manages billing and other services for health care institutions. We addressed challenges to various provisions in its social media policy, as set out below.

> **Respect Privacy. If during the course of your work you create, receive or become aware of personal information about [Employer's] employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with [Employer's] Privacy policies.**

We found that the portion of the rule prohibiting disclosure of personal information about the Employer's employees and contingent workers is unlawful because, in the

absence of clarification, employees would reasonably construe it to include information about employee wages and their working conditions. We found, however, that the portion of the rule prohibiting employees from disclosing personal information only to those authorized to receive it is not, in these circumstances, unlawful. Although an employer cannot require employees to obtain supervisory approval prior to engaging in activity that is protected under the Act, the Employer's rule here would not prohibit protected disclosures once the Employer removes the unlawful restriction regarding personal information about employees and contingent workers.

> **Legal matters. Don't comment on any legal matters, including pending litigation or disputes.**

We found that the prohibition on employees' commenting on any legal matters is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.

> **Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. . . . This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don't make any comments about [Employer's] customers, suppliers or competitors that might be considered defamatory.**

We found this rule unlawful for several reasons. First, in warning employees not to "pick fights" and to avoid topics that might be considered objectionable or inflammatory--such as politics and religion, and reminding employees to communicate in a "professional tone," the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is "objectionable or inflammatory," employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

> **Respect all copyright and other intellectual property laws. For [Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted**

> **material owned by others, trademarks and other intellectual property, including [Employer's] own copyrights, trademarks and brands. Get permission before reusing others' content or images.**

We found that most of this rule is not unlawful since it does not prohibit employees from using copyrighted material in their online communications, but merely urges employees to respect copyright and other intellectual property laws. However, the portion of the rule that requires employees to "[g]et permission before reusing others' content or images" is unlawful, as it would interfere with employees' protected right to take and post photos of, for instance, employees on a picket line, or employees working in unsafe conditions.

> **You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. [Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.**

We found that this rule encouraging employees "to resolve concerns about work by speaking with co-workers, supervisors, or managers" is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

> **Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability and Respect are core [Employer] values. As a company, [Employer] trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate [Employer] policies, and with outside individuals and/or entities. If you're about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it.**

We concluded that this rule was not unlawful. We noted that this section is potentially problematic because its

reference to "consequences to your actions in the social media world" could be interpreted as a veiled threat to discourage online postings, which includes protected activities. However, this phrase is unlawful only insofar as it is an outgrowth of the unlawful rules themselves, i.e., the Employer is stating the potential consequences to employees of violating the unlawful rules. Thus, rescission of the offending rules discussed above will effectively remedy the coercive effect of the potentially threatening statement here.

Finally, we looked at the Employer's "savings clause":

> **National Labor Relations Act. This Policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act.**

We found that this clause does not cure the otherwise unlawful provisions of the Employer's social media policy because employees would not understand from this disclaimer that protected activities are in fact permitted. [McKesson Corp., Case 06-CA-066504]

Provisions on Protecting Information and Expressing Opinions Are Too Broad, But Bullying Provision Is Lawful

In another case, we concluded that several portions of the Employer's social media policy are unlawfully overbroad, but that a prohibition on online harassment and bullying is lawful.

We first looked at the portion of the Employer's policy dealing with protection of company information:

> **Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, 'Personal Electronic Communications'), that could be deemed material non-public information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not**

> **permissible between co-workers online, even if it is done after hours, from home and on home computers. . . .**

We concluded that the rule prohibiting employees from posting information regarding the Employer that could be deemed "material non-public information" or "confidential or proprietary" is unlawful. The term "material non-public information," in the absence of clarification, is so vague that employees would reasonably construe it to include subjects that involve their working conditions. The terms "confidential or proprietary" are also overbroad. The Board has long recognized that the term "confidential information," without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment. See, e.g., University Medical Center, 335 NLRB at 1320, 1322. Here, moreover, the list of examples provided for "material non-public" and "confidential or proprietary" information confirms that they are to be interpreted in a manner that restricts employees' discussion about terms and conditions of employment. Thus, information about company performance, cost increases, and customer wins or losses has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits. Information about contracts, absent clarification, could include collective-bargaining agreements between the Union and the Employer. Information about shutdowns and work stoppages clearly involves employees' terms and conditions of employment.

We also found that the provision warning employees to "avoid harming the image and integrity of the company" is unlawfully overbroad because employees would reasonably construe it to prohibit protected criticism of the Employer's labor policies or treatment of employees.

We found lawful, however, the provision under which "harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers." The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. Claremont Resort and Spa, 344 NLRB 832, 836 (2005). On the other hand, a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity.

Tradesmen International, 338 NLRB at 462. Applying that reasoning here, we found that this provision would not reasonably be construed to apply to Section 7 activity because the rule contains a list of plainly egregious conduct, such as bullying and discrimination.

Next, we considered the portion of the Employer's policy governing employee workplace discussions through electronic communications:

> **Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions with other [Employer] employees through Personal Electronic Communications, provided that access to such discussions is restricted to other [Employer] employees and not generally accessible to the public. . . .**
>
> **This policy is for the mutual protection of the company and our employees, and we respect an individual's rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.**

We found that the provision prohibiting employees from expressing their personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions" is unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees. The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009).

We concluded that the Employer's "savings clause" does not cure the otherwise unlawful provisions. The Employer's policy specifically prohibits employees from posting information regarding Employer shutdowns and work stoppages, and from speaking publicly about "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions." Thus, employees would reasonably conclude that the savings clause does not permit those activities. Moreover, the clause does not explain to a layperson what the right to engage in "concerted activity" entails. [Clearwater Paper Corp., Case 19-CA-064418]

Duty to Report 'Unsolicited' Electronic Communications Is Overbroad, But 'Unauthorized Postings' Provision Is Lawful

In this case, we found that the Employer unlawfully maintains an overly broad rule requiring employees who receive "unsolicited or inappropriate electronic communications" to report them. We found, however, that a prohibition on "unauthorized postings" is lawful.

The Employer is a nonprofit organization that provides HIV risk reduction and support services. The Employer's employee handbook contains an "Electronic Communications" policy, providing as follows:

> **Improper Use: Employees must use sound judgment in using [Employer's] electronic technologies. All use of electronic technologies must be consistent with all other [Employer] policies, including [Employer's] Professional Conduct policy. [Employer] management reserves the right to exercise its discretion in investigating and/or addressing potential, actual, or questionable abuse of its electronic technologies. Employees, who receive unsolicited or inappropriate electronic communications from persons within or outside [Employer], should contact the President or the President's designated agent.**

We concluded that the provision that requires employees to report any "unsolicited or inappropriate electronic communications" is overly broad under the second portion of the Lutheran Heritage test discussed above. We found that employees would reasonably interpret the rule to restrain the exercise of their Section 7 right to communicate with their fellow employees and third parties, such as a union, regarding terms and conditions of employment.

The policy also sets forth the following restriction on Internet postings:

> **No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.**

We found that this provision is lawful. A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer's name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees' exercise of their Section 7 right to communicate about working conditions among themselves and with third parties. [Us Helping Us, Case 05-CA-036595]

Portions of Rules on Using Social Media and Contact with Media and Government Are Unlawful

In this case, we considered the Employer's rules governing employee use of social media, contact with the media, and contact with government agencies. We concluded that certain portions of these rules were unlawful as they would reasonably be interpreted to prohibit Section 7 activity.

Relevant portions of the Employer's rules are as follows:

> [Employer] regards Social Media---blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio---as a form of communication and relationship among individuals. When the company wishes to communicate publicly---whether to the marketplace or to the general public---it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media.
>
> We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].
>
> You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions.'
>
> You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.
>
> Unless you are specifically authorized to do so, you may not:
>
> - Participate in these activities with [Employer] resources and/or on Company time; or
> - Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].

> **Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the [Employer]Corporate Communications Department. . . .**

We concluded that several aspects of this social media policy are unlawful. First, the prohibition on making "disparaging or defamatory" comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer's labor policies or treatment of employees. Second, we concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

We did not find unlawful, however, the prohibition on representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]." Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are "my own and do not represent [Employer's] positions, strategies or opinions" is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

We also considered the Contact with Media portion of the Employer's rules, which provides:

> **The Corporate Communications Department is responsible for any disclosure of information to the media regarding [Employer] and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond with members of the media or press regarding [Employer] or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the**

> obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding [Employer] of its business activities.
>
> You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:
>
> - All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.
> - Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding [Employer] by the Company's business partners or any third parties including consultants.
>
> If you have any questions about the Contact with Media Policy, please contact the [Employer] Corporate Communications Department . . . .

We concluded that this entire section is unlawfully overbroad. While an employer has a legitimate need to control the release of certain information regarding its business, this rule goes too far. Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging, speaking at a union rally, etc. As noted above, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer rule that prohibits any employee communications to the media or, like the policy at issue here, requires prior authorization for such communications, is therefore unlawfully overbroad.

Finally, we looked at the rules' provisions on contact with government agencies:

> Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The General Counsel

> must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.
>
> If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.
>
> If phone contact is made:
>
> - Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered;
> - Explain that all communications of this type are forwarded to the Company's General Counsel for a response;
> - Provide the individual with the General Counsel's name and number . . . if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and
> - Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.

We concluded that this rule is an unlawful prohibition on talking to government agencies, particularly the NLRB. The Employer could have a legitimate desire to control the message it communicates to government agencies and regulators. However, it may not do so to the extent that it restricts employees from their protected right to converse with Board agents or otherwise concertedly seek the help of government agencies regarding working conditions, or respond to inquiries from government agencies regarding the same. [DISH Network, Case 16-CA-066142]

Employer's Entire Revised Social Media Policy--With Examples of Prohibited Conduct--Is Lawful

In this case, we concluded that the Employer's entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer's social media policy that was initially alleged to be unlawful.

As explained above, rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.

Applying these principles, we concluded that the Employer's revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity. For instance, the Employer's rule prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Similarly, we found lawful the portion of the Employer's social media policy entitled "Be Respectful." In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs, or videos, could be overly broad. The rule, however, provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassment or bullying" would include "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions. [Walmart, Case 11-CA-067171]

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably

could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

