



Labor and Employment Law Breakfast

November 2011

Presented by:
Andrew Moriarty and Catherine Brito

The NLRB and the NLRA

- Covers employers who are not unionized
- Protects "concerted activity"
- The Employee Free Choice Act stalled
- Particularly active Board under the Obama administration



The NLRB's New Labor Poster



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 time; 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.
5/17/2008 2:01



Legal Counsel to Great Companies®

Tips for Avoiding Union Organizing

- Competitive health, vacation, sick leave & other benefits
- Overtime and competitive pay
- Flexible time
- Friendly reminders
- Transparency
- Open door policy
- Speak out!



Social Media



Social Media

- **Protected speech includes:**
 - Concerted activity for “mutual aid or protection”
 - “Truly group complaints”
- **It does not include:**
 - “Mere griping”
 - Unlawful or violent behavior, trade secrets/ confidential information, disruptive, harassment, maliciously false

5 Questions to Ask

1. Is it **protected** speech?
2. Is it **exempted**?
3. What is the employee's **position**?
4. Is it **disrupting** the workplace?
5. Is it taking place during **work hours** using **company resources**?



Social Media Policies

- Must not have a “chilling” effect on protected concerted activity
- Examples of overbroad policies:
 - A rule prohibiting employees from posting “inappropriate discussions” about the company, management or co-workers
 - A prohibition on posting "private or confidential" information without a definition of what that meant
 - A ban on postings that would "embarrass, harass or defame" the employer or its employees, officers, board members or representatives
 - A prohibition on using an employer's logos or photographs of its stores on social media



Marijuana and the Workplace



- *Roe v. Teletech Customer Care Management*
- MUMA Amendments, Chapter 181, Laws of 2011
 - Nothing in MUMA “requires any accommodation of any on-site medical use of cannabis in any place of employment”
 - Nothing in MUMA “requires an accommodation for the medical use of cannabis if an employer has a drug-free work place”

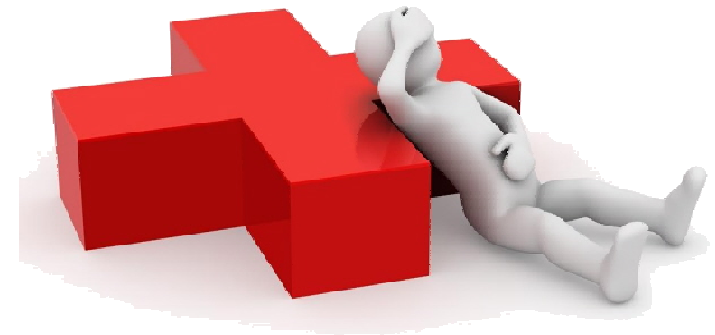
Recent Washington Disability Cases

- Trial and error approach to disability accommodations
- “Medical necessity”
- Unprofessional behavior resulting from a disability
- The alleged public policy “entitling all employees to take reasonable medical leave”



Seattle's Paid Sick / Safe Leave Ordinance

- Employee coverage
- Employer coverage
- Accrual and use of Seattle time
- Carryover and payout of Seattle time



Seattle's Paid Sick / Safe Leave Ordinance

- Employers with paid time off policies
 - Traditional vacation and sick leave policies
 - PTO policies
- Use of sick time
- Use of safe time



Seattle's Paid Sick / Safe Leave Ordinance

- Requesting Seattle time
- Documentation of need
- Cost of documentation



Class Arbitration Waivers

- What are class arbitration waivers?
- U.S. Supreme Court upheld class arbitration waivers in *AT&T Mobility v. Concepcion*
- Has *Concepcion* meant the death of class actions?



Class Arbitration Waivers

- What should you do to implement class waivers?
- Pros and cons of arbitration



Wal-Mart v. Dukes

- Overruled certification of nationwide class of 1.5 million female Wal-Mart employees
- It was not enough that the class members raised a common question (i.e., was I discriminated against?)
- Plaintiffs had to show common proof (the "glue") that would lead to common answers



Class Actions After *Wal-Mart v. Dukes*

- Class certification is often more difficult and more expensive
- But *Dukes* does not signal the end of class litigation
- Applies to wage-and-hour class actions



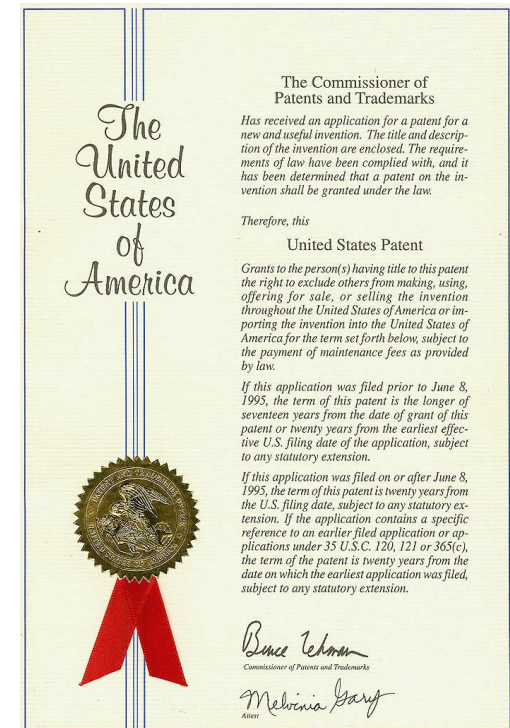
Independent Contractors

- DOL, IRS and state agencies teaming up
- Lawsuits and audits
- Independent contractor tests



Invention Assignment Agreements

- **Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.**
 - Stanford's inventions assignment agreement: "agrees to assign"
 - Cetus's Visitor's Confidentiality Agreement: "will assign and do[es] hereby assign"



Taking Advantage of the Computer Fraud Abuse Act ("CFAA")

- What is the CFAA?
- When does it apply?
- How can I take advantage of it?

