



Employment Law Update 2011 ■ August 4, 2011

Labor and Employment Law Roundtable

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Association of Corporate Counsel
Central Ohio Chapter

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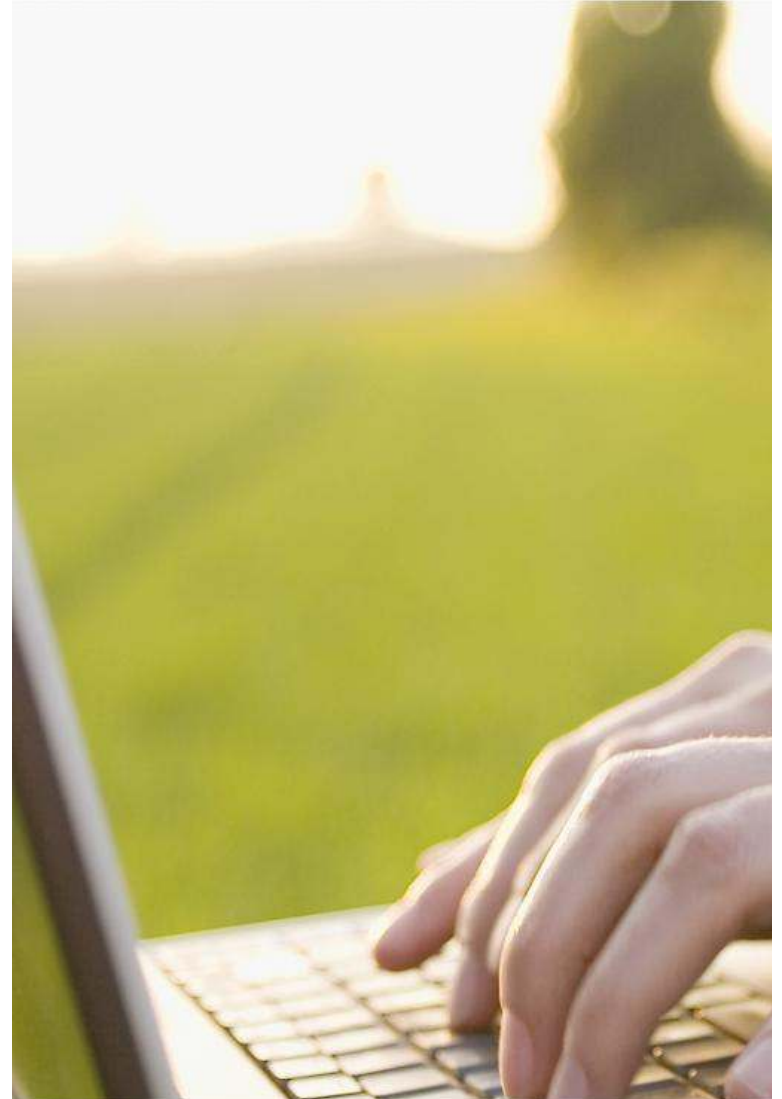
Scenario # 1 – *Adventures in Social Media*


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Key Take-Away Observations

- ❑ You can't ignore the social media issues
- ❑ You need a policy
- ❑ Beware the NLRB and its expected "carve-out"
- ❑ Train employees on use of social media
- ❑ Be wary of privacy concerns, although they are somewhat limited
- ❑ Be mindful of appropriate use in recruiting and discipline





**Scenario # 2 –
*Leave Practices
as Management
Sees Them***

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Key Take-Away Observations

- ❑ Leave administration is an exceptional challenge
- ❑ Consider auditing your leave compliance
- ❑ Have a plan and a guru for proper administration
- ❑ Realize that third party administration can be helpful but it's not without meaningful dangers
- ❑ Educate management to avoid bad scenarios






Scenario #3 – *The Advent of Weight Discrimination Law*



Key Take-Away Observations



- ❑ Beware the ADAAA and weight issues
- ❑ Monitor state/local law on weight and personal appearance discrimination
- ❑ Push respect for others as a policy and practice
- ❑ Job-relatedness is a key
- ❑ Consider wellness programs—they can be helpful and they are the right thing to do



**Scenario #4 –
*Policy and Practice
Problems Driven by
Inconsistent State
Laws***

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Key Take-Away Observations



- ❑ Beware the nationwide policy, particularly in regard to pay and leave issues
- ❑ The differences are greatest in regard to meal periods, exemptions and other wage and hour issues
- ❑ Be aware that contract law is state-oriented too
- ❑ A one size fits all handbook is now impossible unless it contains state specific modifications



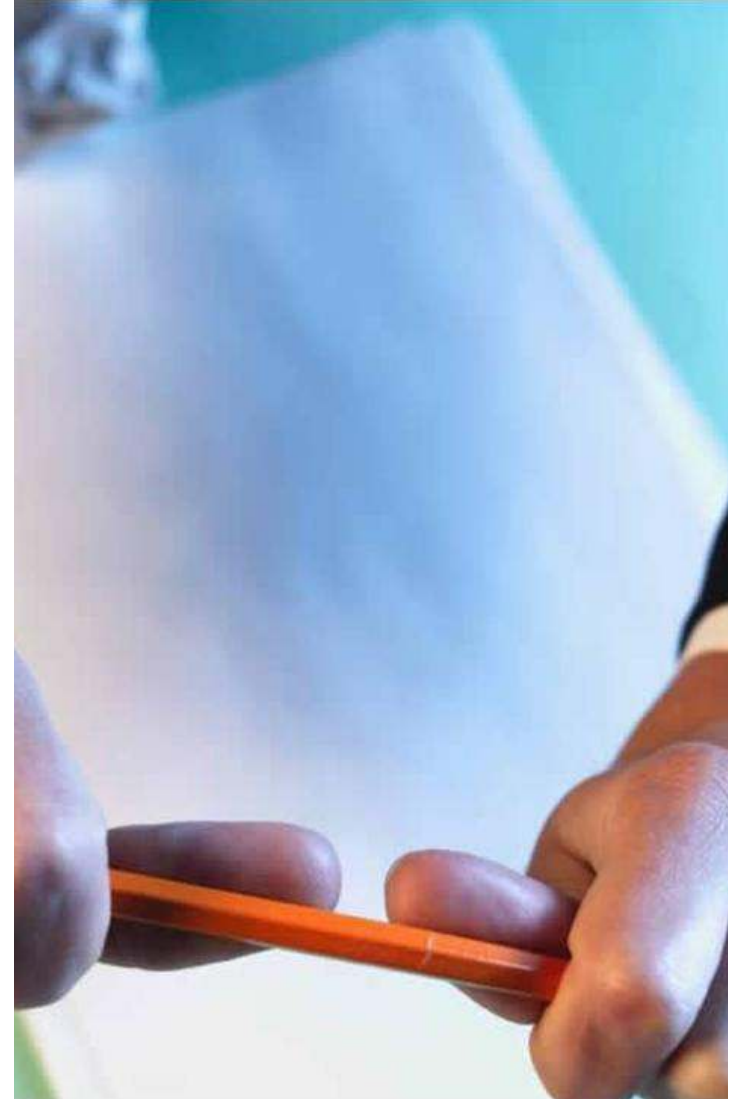
Scenario # 5 –
Anticipating the
Problems of
Anti-Bullying Laws

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Key Take-Away Observations

- ❑ **Beware NY and NJ, and perhaps CA (as well as local ordinances)**
- ❑ **With the right facts, bullying cases can arise under EEO and NLRA law too**
- ❑ **It makes sense to start solving the problem now**
- ❑ **Respect for others policies and proactive training are key**
- ❑ **Take anti-bullying action where appropriate**





**Scenario # 6 –
*Tough Issues Ahead
under the ADAAA and
Its New Regulations***

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Key Take-Away Observations



- ❑ The new law and the new EEOC regulations are broad
- ❑ The emphasis has moved from coverage to accommodation
- ❑ Interactive means interactive
- ❑ Beware the difference between “safety concerns” and “direct threat” defenses
- ❑ Requests for Unpaid Leave
- ❑ Have a guru and a process



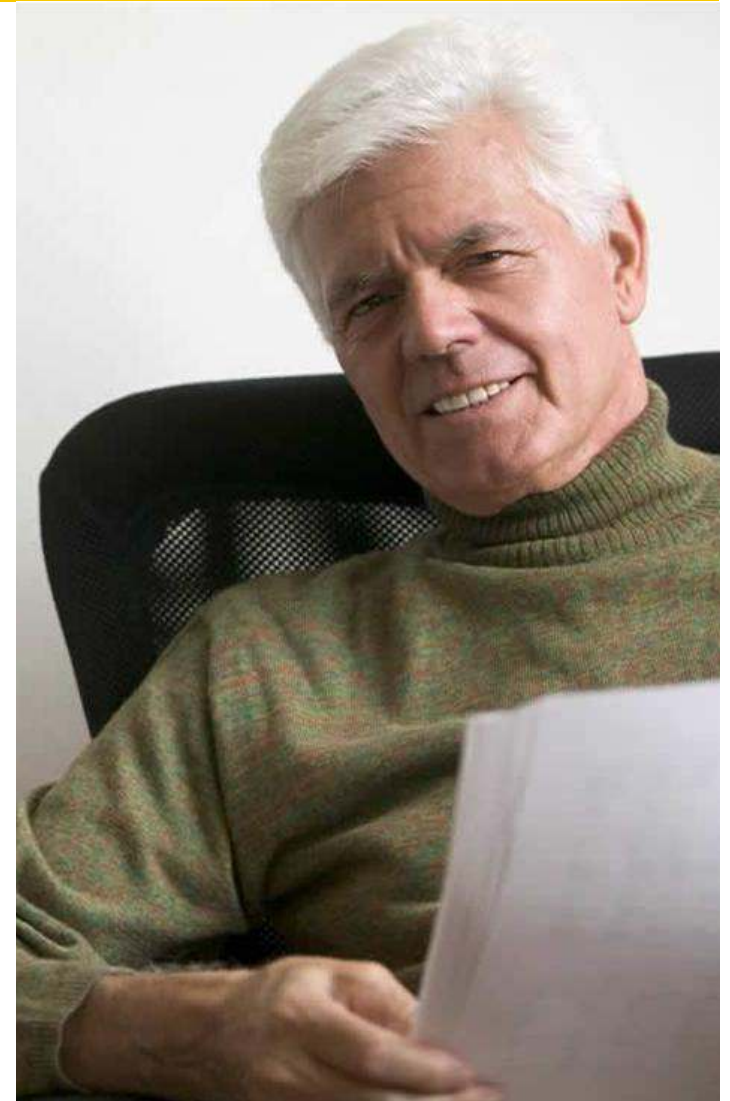
**Scenario #7 –
*What to Do With or
About an Aging
Workforce***

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Key Take-Away Observations

- ❑ There is a business choice needed in some circumstances, and it doesn't require violating the law
- ❑ You can get younger if there is a need, but do it the right way
- ❑ You can value your older workers and incentivize them
- ❑ Where appropriate, you can do both of these things at the same time



Legislative and Regulatory Update



2011 Proposals to Amend NLRA

- ☐ **Secret Ballot Protection Act**
- ☐ **Right to Work Protection Act**
- ☐ **Job Protection Act**

Department of Labor



- ❑ **Proposed rule narrowing advice exemption to employee persuader reporting requirements**
- ❑ **Disclosure by employers and their law firms of:**
 - Agreements or arrangements involving direct or indirect persuader activities
 - Nature of the work performed
 - Fees and disbursements
 - For all employer clients

The NLRB



- ▣ **Wilma Liebman (D) current term expires August, 2011**
- ▣ **Craig Becker (D) recess appointment expires when the Senate ends its 2011 session**
- ▣ **Brian Hayes (R) term expires December 16, 2012**
- ▣ **Mark Pearce (D) term expires August 27, 2013**

Senate Confirmation Battle Looms



- ❑ **Terence F. Flynn (R)** nominated to serve four-year term
- ❑ **Senate Republicans vow to fight Becker nomination and nomination of Lafe Solomon (D) to serve four-year term as general counsel**

What's the Issue?

- **Board is using administrative authority and case law to impose EFCA-like rules on employers such as**
 - Union access to employees at work
 - Unit rules that favor smaller units
 - Reduced time for holding elections
 - Greater use of mail ballots and internet/phone voting initiative
 - Closer scrutiny of employer rules and conduct

Proposed Election Rule Amendments



- ❑ **Quickie elections**
- ❑ **Pre-election hearings with seven days' notice**
- ❑ **“Statement of Position” pleading requirement**
- ❑ **20% rule for pre-election eligibility determinations**
- ❑ **Offer of proof condition for presenting evidence**
- ❑ **No pre-election requests for review**
- ❑ **Voter eligibility list due within two days of agreement or direction of election**
 - With phone numbers and email addresses
- ❑ **Discretionary consideration of post-election requests for review**

Proposed Notice of Employee Rights



- ❑ **Similar to one-sided federal contractor notice**
- ❑ **Electronic notification if employer customarily communicates with employees that way**
- ❑ **Failure to post would be ULP; could toll statute of limitations and create "adverse inference" of union animus**

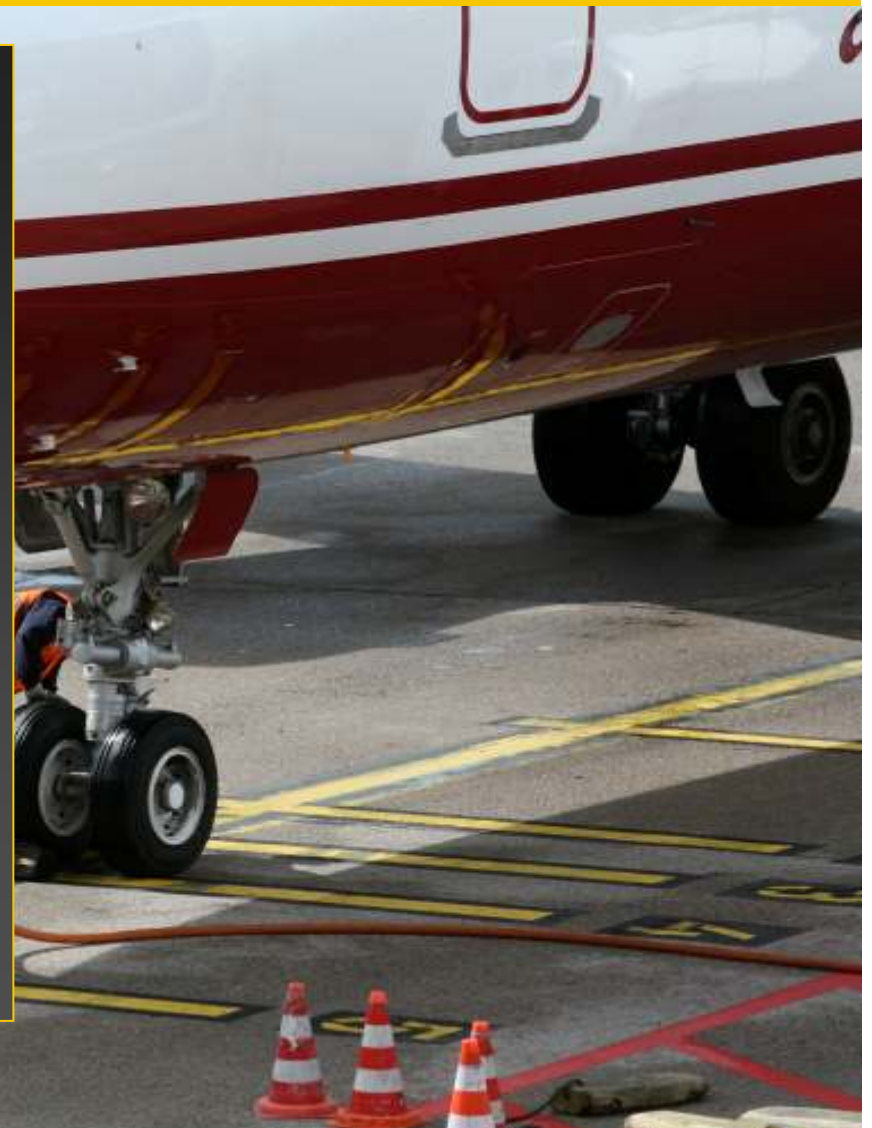
Not Playing Solomon

- ▣ **Acting General Counsel's recent actions in line with NLRB majority's desire to tilt the playing field in favor of unions**



Boeing Complaint

- ❑ **Company alleged to have cited past strike activity and possibility of future strikes as reason it chose to locate second plant in South Carolina rather than Washington**
- ❑ **GC seeks an order requiring Boeing to maintain second production line in Washington State but does not seek closure of South Carolina plant or prohibit Boeing from assembling planes there**



State Card Check Amendments

- ☐ **Secret ballot protection laws approved by voters in several states**
- ☐ **May 6, 2011 - NLRB files suit in federal court seeking a declaration that Arizona law is preempted**



GC Memos

- **10-07. Pursuit of 10(j) injunction requests for unlawful discharges committed during organizing campaigns**
- **11-01. Pursuit of “effective remedies” for employer unfair labor practices committed during organizing campaigns including reading notices and union access to bulletin boards and employee information**

GC Memos

- **11-06. Pursuit of “enhanced” remedies for bad-faith bargaining during first contract negotiations including reading of notices, extending certification year bar, imposing schedules for bargaining, reimbursement of union for bargaining and litigation expenses**
- **11.04. “Default language” in settlement agreements**

GC 11-13 (Information Requests)

- ❑ **Employers and unions must be prepared to back-up statements made at the bargaining table**
- ❑ **Includes claims made by employers that its proposals are necessary to ensure that employer remains “competitive”**
- ❑ **Will lead to increase in tactical use of information requests and ULP charges in bargaining**

Recent Decisions



Parexel Int'l LLC, 356 NLRB No. 82 (2011)

- ☐ Majority held that employer violated 8(a)(1) by firing an employee in a "preemptive strike" intended to prevent her from engaging in protected complaints about wages and favoritism
- ☐ Hayes describes finding of violation in the absence of any actual concerted activity as "unprecedented" and expresses concern about application of rule in future cases



Jury's Boston Hotel, 356 NLRB No. 114 (2011)

- ❑ Board may set aside election based solely on overbroad provisions in handbook regarding wearing buttons, loitering, solicitation
- ❑ Board found violation despite generic disclaimer that provisions were not intended to limit protected activity under NLRA
- ❑ Union recently won rerun election

Brandon Reg. Med. Ctr., 356 NLRB No. 162 (2011)

- **Union did not violate secondary boycott provisions of NLRA by peaceful display of 16-foot rat balloon in front of hospital even though purpose was to persuade hospital to cease doing business with nonunion construction contractor**
- **Balloon was symbolic speech, and nothing in the location, size, or features of the balloon were likely to frighten those entering the hospital**

New York, New York, 356 NLRB No. 119 (2011)

- ❑ **Casino violated NLRA when it prohibited off duty employees of contractor from distributing handbills in nonworking areas casino's property**
- ❑ **Employer must show that activity "significantly interferes" with use of the property or that restriction is needed to maintain production or discipline**

In the Pipeline



- ❑ Board has solicited amicus briefs in a number of cases
- ❑ Poised to ignore practice of hesitating to overrule precedent when Board has fewer than five Senate-confirmed members
- ❑ Liebman cited practice in a dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007)

Specialty Healthcare, 356 NLRB No. 56 (2010)

- **May decide without rulemaking standards to be applied in determining appropriate units in non-acute healthcare facilities**
- **Current standard is the Park Manor “pragmatic or empirical community of interests” approach**
- **Board may hold that unit of all employees performing the same job at a single facility is presumptively appropriate**

Roundy's, Inc., 356 NLRB No. 27 (11/12/10)

- Will decide the test to be used in determining whether an employer engages in unlawful “discrimination” by refusing to grant non-employee union reps access to its premises while permitting other individuals, groups, or organizations to use the employer's premises for their activities
- Board is likely to revisit standards previously used in *Sandusky Mall* and *Register Guard*

Social Media Meets the NLRB

- ❑ www.jobvent.com
- ❑ www.hateboss.com
- ❑ www.workrant.com
- ❑ www.rantasaurus-rex.com

NLRB's Current Message to Employers

- ❑ In October of 2010, the NLRB filed a charge against ambulance company, AMR, for firing an employee who called her supervisor a “mental patient” in her Facebook post, which was only accessible to her friends
- ❑ AMR claimed the employee’s post violated its social media policy
- ❑ The NLRB said that any social networking policy that prohibited disparagement was *per se unlawful* unless it carved out rights under the National Labor Relations Act
- ❑ In February of 2011, the NLRB issued a press release stating that the case had been settled

Questions & Answers





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THANK YOU

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