

*2011 Employment and  
Labor Law Update*



*presented by:*



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# Today's Agenda

- EEO Trends
- New Legislation
- NLRB Update
- Social Networking, Texting, & Blogging
- Wage & Hour
- Arbitration Considerations
- State Laws

# EEO Trends



# EEOC UPDATE

## Recession? What Recession?!

- **More money for the EEOC in 2010:**
  - Set out to hire an additional 383 employees, including investigators, trial attorneys, and support staff in addition to the 155 new employees hired in FY 2009
  - Actually brought on-board 198 net new hires
- **What were the results?**



# EEOC UPDATE: 2010 – Highest Year for EEOC Charges in Its 45-Year History

- **2010:**
  - 99,922 charges
  - \$546 million in monetary relief by EEOC—highest ever
- **Aggressively filing lawsuits**
  - **200 during last two months of fiscal year 2010**



# EEOC UPDATE

## A “New Breed”

- **More Aggressive Posture**
  - Mandatory public press releases for settlements
  - Refusal to allow early “no fault” settlements in some cases
  - Requiring injunctive relief with follow-up powers

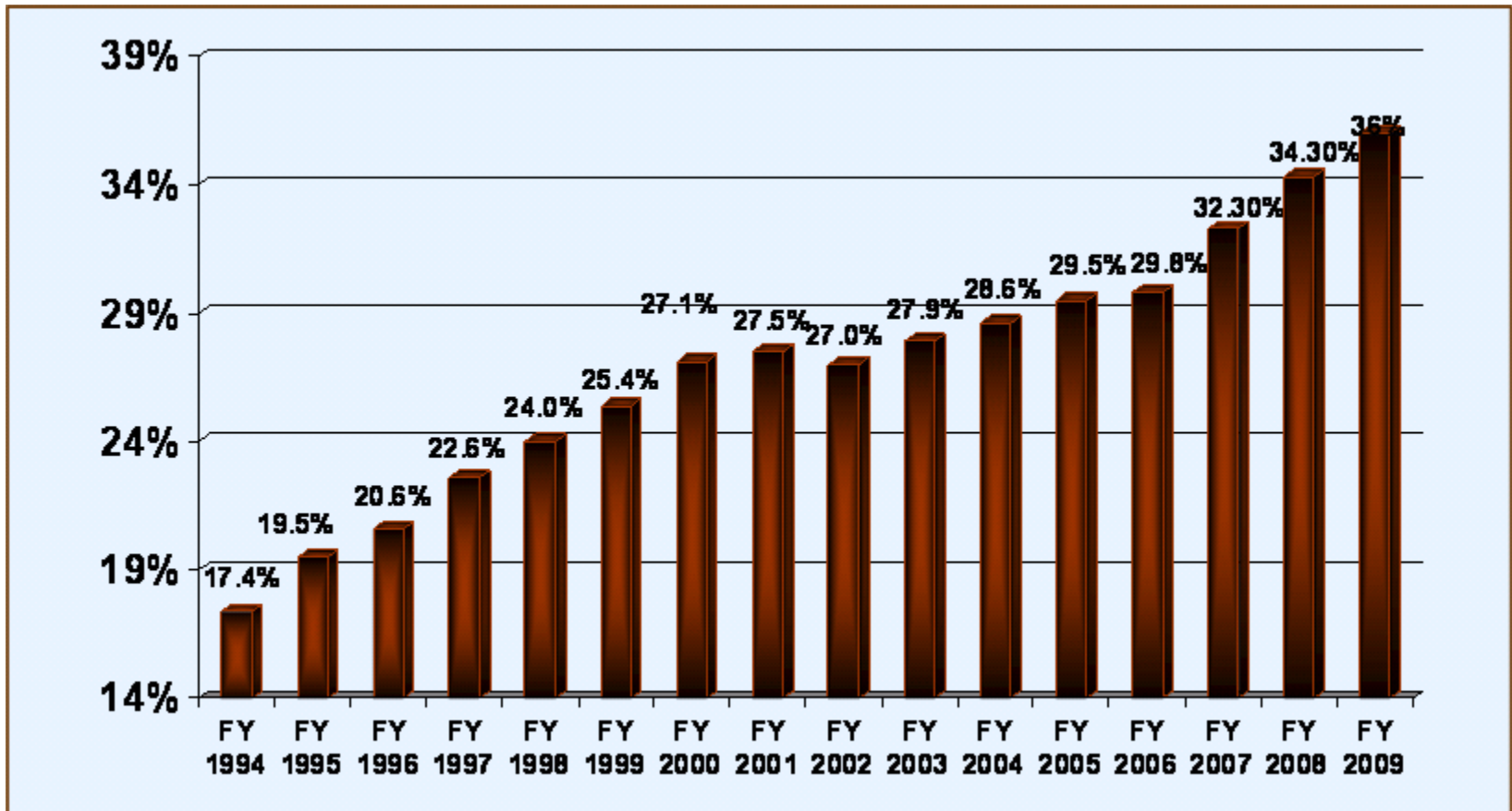


# EEOC Litigation Statistics...Perhaps Not What You Would Expect

- Retaliation is the most common basis for lawsuits: followed by disability discrimination, sex discrimination (including sex harassment), race and religious discrimination



# EEOC Retaliation Charges



# Prediction: Retaliation Claims Will Continue to Increase



- Coverage of protection has been broadened
- Burden of Proof has been reduced
- Third parties have standing to sue based on someone else's protected activity

# Solutions

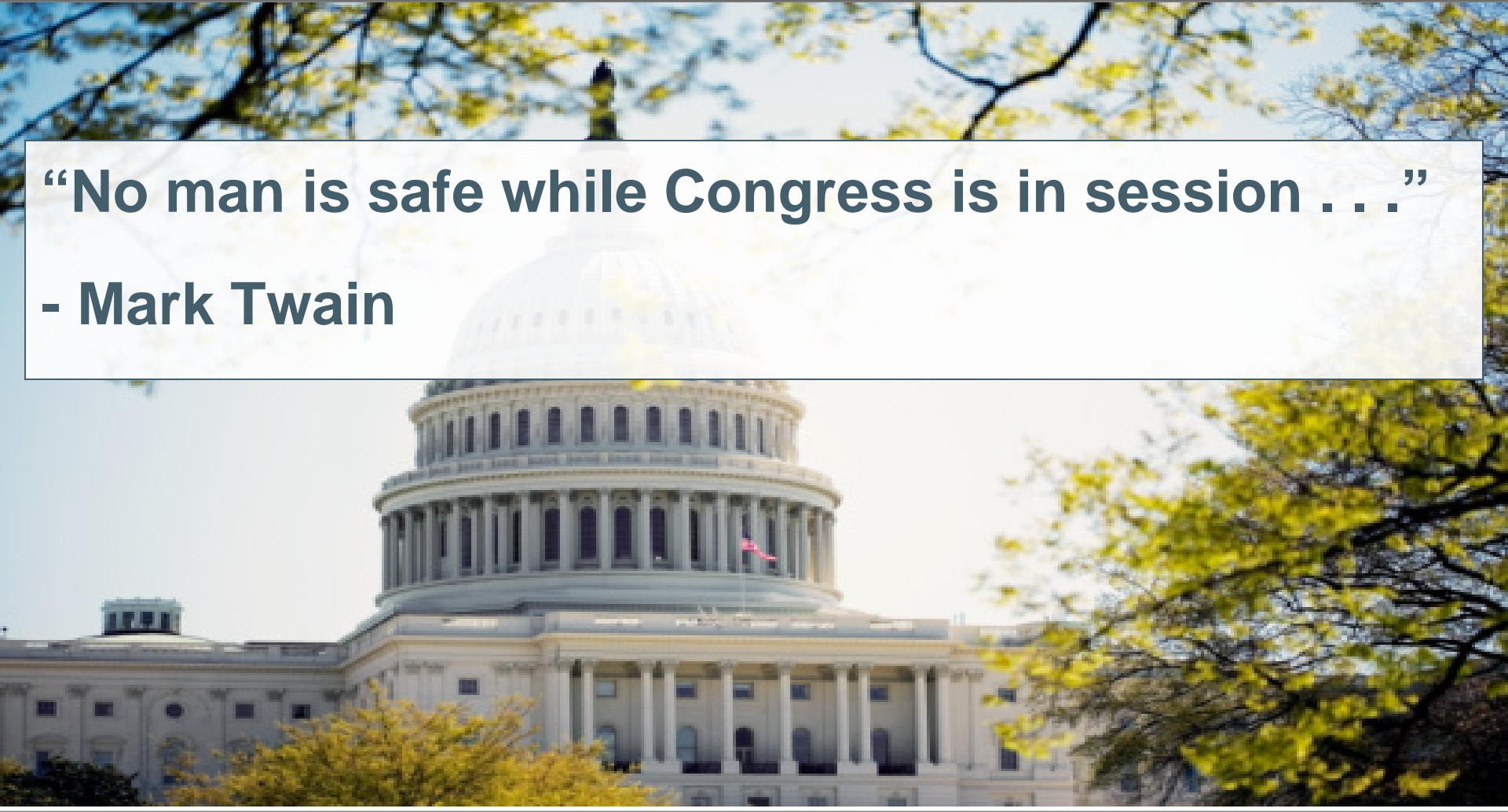


- Have a separate anti-retaliation policy
- Separate claims
- Educate managers
- The weekly visit and documentation

# Changes in Federal Law

**“No man is safe while Congress is in session . . .”**

**- Mark Twain**



# Genetic Information Nondiscrimination Act (GINA)

- Law took effect November 21, 2009; final regulations effective January 10, 2011
- Prohibits use of genetic information in making employment decisions
- Restricts acquisition of genetic information by employers and other covered entities, and strictly limits disclosure of such information
- Prohibits retaliation against employees who complain about genetic discrimination
- Impacts wellness programs

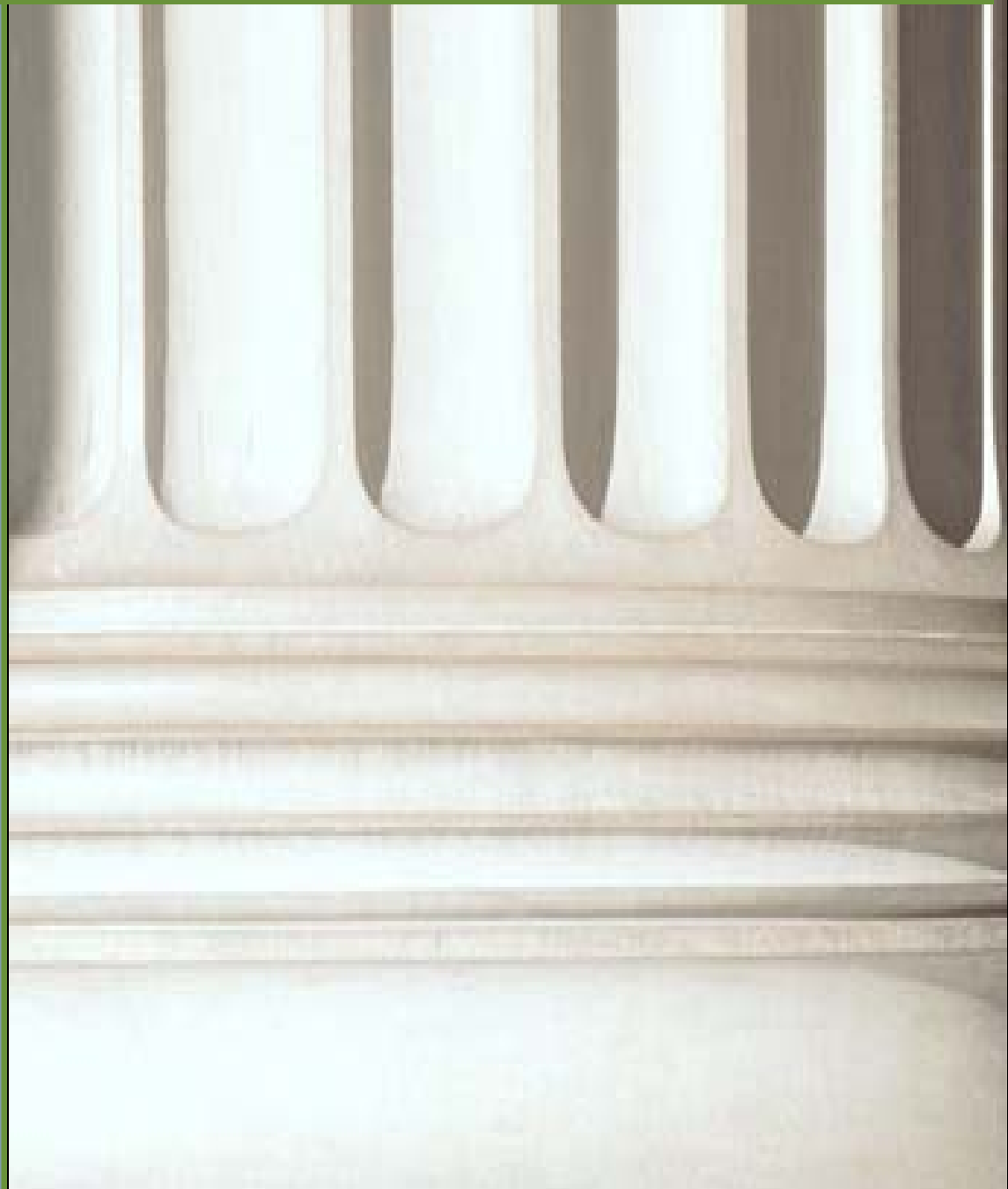


# Patient Protection and Affordable Care Act Provision



- **Amends the FLSA to require employers to provide rest breaks and space for employees who are nursing mothers to express milk**
  - Effective March 23, 2010
- **Applies to employers engaged in interstate commerce who employ 50 or more employees**
  - Employers with fewer than 50 employees not required to provide breaks if an undue hardship considering the difficulty or expense in relation to the size, financial resources, nature or structure of the employers' business
  - Does 50 employees include only full-time employees? For what employment duration?
  - Geographical scope?

Final  
Regulations  
Under the  
ADAAA



# Nine Rules of Construction

1. Broad construction of “disability”; not a demanding standard
2. Significant/severe restriction in “major life activity” not required
3. Substantial limitation on a major life activity should not be primary object of attention



# Nine Rules of Construction

4. Individualized assessment still required, but with lower standard than before
5. Scientific, medical or statistical analysis not required to compare individual with “most people in the general population”
6. No more consideration of helpful mitigating measures



# Nine Rules of Construction

7. Impairments that are episodic or in remission are viewed when they are active
8. Substantial limitation in only one major life activity is enough
9. Effects of an impairment can be substantially limiting even if duration is under six months



# How Does ADAAA Change Managing Disabilities?

- Forces employers to follow accommodations process in most instances
- Underscores prior wisdom of never assuming individual will not be protected



# How Does ADAAA Change ADA Litigation?

- More individuals likely to file charges and suits
- More plaintiff's attorneys likely to take cases
- Less threshold hump of establishing protection
- Many more "regarded as" claims



# Expected Changes in Litigation

- Cases may proceed longer and have higher settlement value
- Greater emphasis on multi-layered defense strategies
- Higher possibility of material factual disputes



# NLRB Update



# Union Membership Continues Decline



- In 2010, Union-represented employees fell to 11.9%
- Union membership in the private sector is now only 6.9%
- However, reported death of unions is extremely premature!

# The *NEW* Political Landscape

## NLRB

### ■ Two Member Board

- Wilma B. Liebman (D) – Chairman (Aug. 2011)
- Peter Schaumber (R) (Aug. 2010)

### ■ Recess appointments made on **March 27, 2010**

- Craig Becker (D) AGC of SEIU (end of 2011)
- Mark Pearce (D) Union Attorney

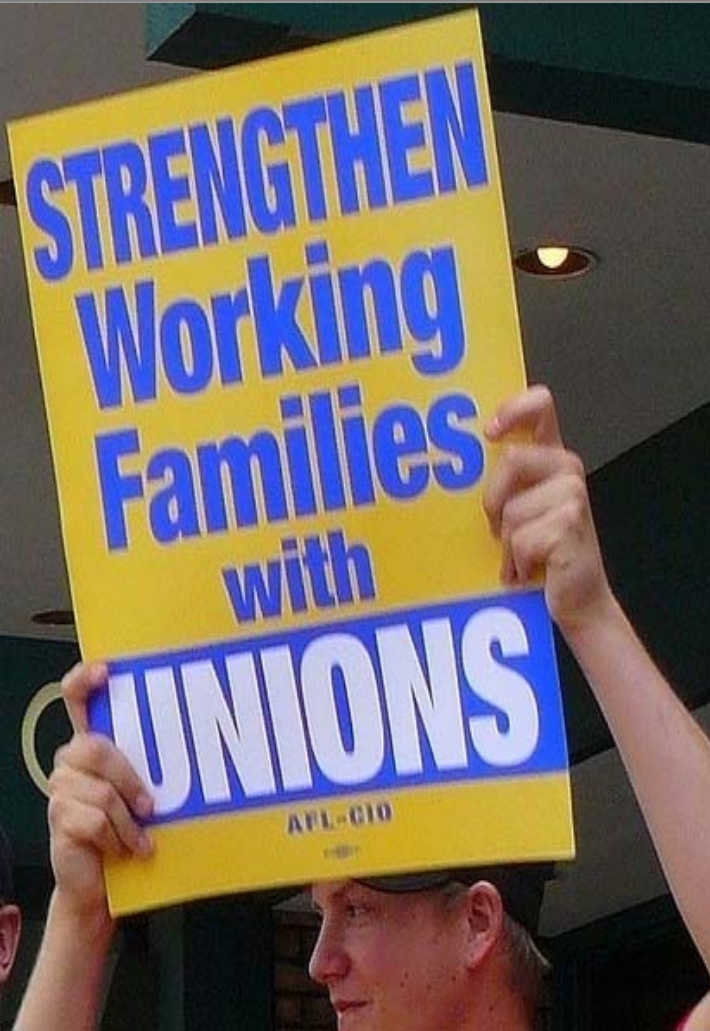
### ■ **June 22, 2010; Senate confirms nominations of:**

- Mark Pearce (D) (Dec. 2013)
- Brian Hayes (R) (Dec. 2012)
- No action re Craig Becker

### ■ NLRB acting General Counsel Lafe Solomon



# “EFCA Lite”



- Through rulemaking and its decisions, current NLRB may accomplish many of the components of EFCA  
⇒ “EFCA Lite”
- Most of the NLRB’s proposed plans appear to make it easier for unions to organize

# Top 10 Predicted Changes That May Facilitate Unionization

1. Union access to employer private property to organize
2. Allowing solicitation by pro-union supervisors
3. Inclusion of temporary workers in bargaining/voting units
4. Change in definition of supervisor
5. Electronic or web-based voting

# Top 10 Predicted Changes That May Facilitate Unionization

6. Invalidation of employer work rules
7. A more aggressive NLRB
  - Enhanced penalties (NLRB changes from simple to daily compound interest calculations on money damages)
  - Investigative subpoenas
  - Court enforcement
  - 10(j) injunctive relief
  - Bargaining orders
8. Use of e-mail and other company IT systems for solicitation

# Top 10 Predicted Changes That May Facilitate Unionization

9. Greater use of social media and other technologies

10. Expedited elections

- NLRB by edict holds elections within 42 days of petition
- Some NLRB regional offices pushing for 35 day outer limit
- Is 10 days in the near future?



# A Few More Things

- NLRB Required Posting - NLRB has recently proposed a rule that would require all employers to post a Notice of Employee Rights under the NLRA (currently, only federal government contractors are required to post such notice)
- The NLRB is suing states to overturn amendments to the state constitutions that purportedly require any group of employees that want to unionize to conduct a secret ballot vote

# *Parexel International L.L.C.*

- The Board held an employer is liable for discharging an employee under the “preemptive discharge theory”. Under this new theory, an employer may be liable for discharging an employee if the Board concludes the discharge was a “preemptive strike” to prevent the employee from engaging in protected conduct, before the employee actually engaged in any protected conduct.

# *Hawaii Tribune-Herald*

- The Board held that an employer violated the Act by firing an employee who secretly recorded a meeting with his supervisor. The Board implied that any work rule prohibiting employees from making clandestine audio recordings in the workplace might be deemed unlawful, if the rule did not include an express exception for recordings made in an effort to protect or advance employee rights under Section 7.

# NLRA Meets Facebook

- On 10/27/10, the NLRB issued a complaint against America Medical Response
- NLRB alleged that AMR suspended then terminated the employee due to negative remarks she posted about her supervisor on her Facebook page from her home computer!
- AMR had policy prohibiting employees from making disparaging, discriminatory or defamatory comments about the company, its managers, employees or clients
- NLRB argues this policy overbroad and interferes with employee's right to engage in protected concerted activity

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

[http://www.nlr.gov/shared\\_files/Press%20Releases/2010/R-2794.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2794.pdf)

# NLRA Meets Facebook

- Case settles on Feb. 7, 2011
- Under settlement, AMR will revise its Internet policy to allow employees to discuss wages, hours, and working conditions with co-workers outside of the workplace
- Company will not apply or construe this policy in a manner that improperly interferes with employees' rights under the NLRA

# *NLRB v Boeing*

- The NLRB lodged a complaint in April against Boeing over its decision to open a production line at a South Carolina nonunion facility, alleging the move was retaliation for strikes by unionized Washington state employees

In the complaint, the NLRB seeks to stop Boeing from building airplanes at the nonunion facility

# Social Networking, Texting, & Blogging



# Staggering Numbers



- **Social Networking:** Facebook has 500 million active users and LinkedIn has over 70 million. People spend over 700 **billion** minutes per month on Facebook alone!



- **Texting:** on average, **4.1 billion** text messages are sent every day, and the number of texts has doubled just in the past year. More than 50% of all adults text during any given week



- **Blogging:** 200 million blogs currently on the web; 54% of bloggers post or “tweet” daily. 7 million people use microblog service Twitter, and more than 62% access Twitter from work only



- **Bottom line:** These technologies are impacting your organizations, and can no longer be ignored!

# Reasons for Concerns



- July 2009 independent study shows 1.5% loss of total employment productivity because of social networking sites
- 77% of regular Facebook users log in at work
- Some employees spend two hours per day at work on Facebook, though average is 15-20 minutes in work day
- Some employees log in only at work and not at home!
- 87% of those polled could not identify a single business purpose of Facebook activities

# And Who's Winning the Battle?

- 60% of managers say they have the right to know how employees represent themselves and their employers on social networking sites
- 53% of employees say managers have no business in what the employees do and say on social networking sites
- Currently, only 17% of employers try to track employee use
- 49% of employees say they won't change their behavior even if employer tracks

# E-Policies Really Matter



- “[E]mployer policies concerning communications will of course shape the reasonable expectations of employees, especially to the extent that such policies are clearly communicated.”

# Revamping Your Policy



1. Modify electronic resources policies to include texting, and update as needed
2. Address both company's own electronic resources and employee's personal account or devices
3. Warn employee that personal e-mail will be subject to monitoring the same as business e-mail

# Revamping Your Policy



4. Mandate use of company-issued equipment and company-owned account to conduct company business
5. Consider notifying employees that consent will be requested when access is needed for business purposes or investigation
6. Advise employees that refusal to consent may result in discipline, up to and including termination

# Revamping Your Policy



7. Conduct tailored searches only for legitimate business reasons
8. Consider policy reminders (e.g., pop-up screens)
9. Train managers not to make contradictory statements (“Don’t worry, we never enforce that policy”)
10. Searches, reviews and monitoring should only be conducted in a reasonable manner

# Wage & Hour



# Renewed Enforcement



“Let me be clear: The Department of Labor is back in the enforcement business.”

- Labor Secretary Solis

# DOL Policy and Enforcement Initiatives

- Proposed 2011 FY federal budget includes \$117 billion for DOL, with \$244M expected to be allocated to the WHD
- Proposed federal budget includes a “misclassification initiative” to combat the misclassification of employees as exempt and/or independent contractors

# DOL Policy and Enforcement Initiatives

- “We Can Help” campaign launched in April 2010 to educate and assist workers
- “Plan/Prevent/Protect” initiative announced in May 2010 as the “beginning of a broader regulatory and enforcement strategy”
- “Find and Fix” strategy to encourage employers to take responsibility to find and fix problems before a DOL investigator arrives on their doorstep to inspect, discover problems, and enforce the law
- “Bridge to Justice” program which provides referrals to plaintiffs’ attorneys and documentary support for lawsuits they may bring

# DOL Policy and Enforcement Initiatives

- Decreased cooperation with employers
  - No more opinion letters
  - No more partnership agreements with employers
  - No more supervision of back wage payments
- Unannounced policy changes
  - Mandatory penalties for repeat/willful min. wage and overtime violations (up to \$1,100 per employee)
  - Investigators may not allow employers to self-audit
  - WH-58 waivers issued only after full DOL-initiated audit

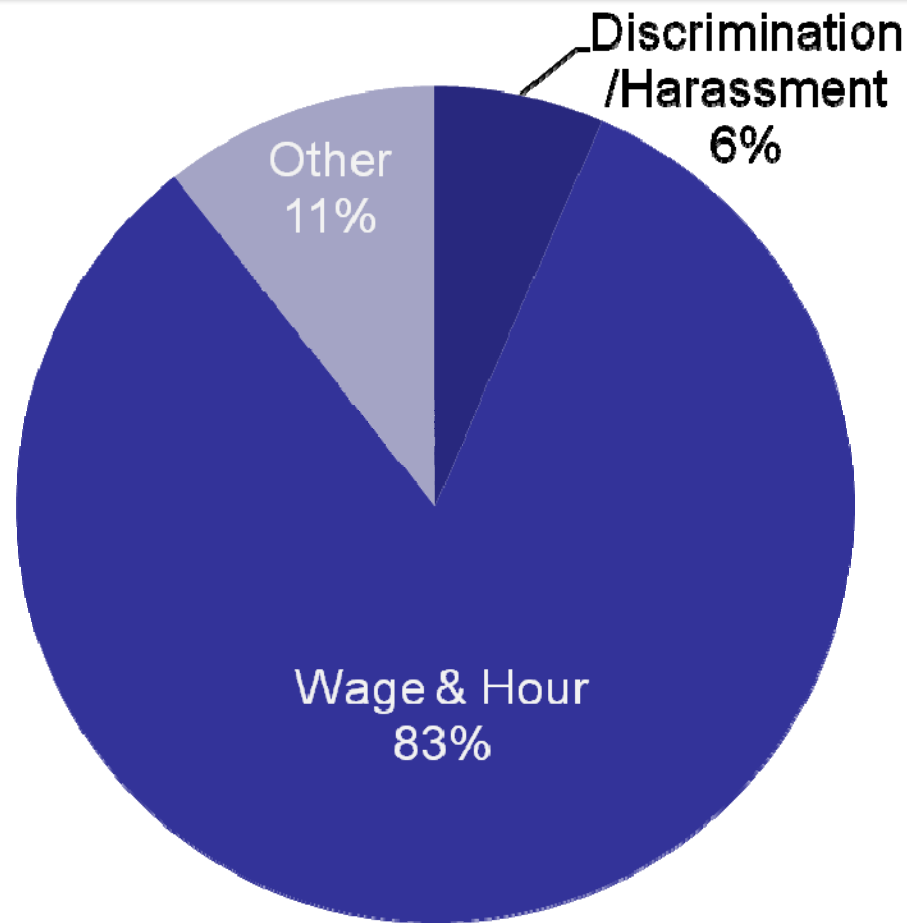
# Frequently Litigated Issues

- **Exempt misclassifications**
  - Exempt v. Nonexempt
  - Employee v. Independent Contractor
  - Paid employee vs. Unpaid Interns?
- **Regular rate miscalculations**
- **Rounding time**
- **Auto deductions for meal periods**
- **Missed/short meal and rest breaks**
- **Off-the-clock work**
- **Improperly calculating overtime**
  - Remote work
  - Pre- and post work activities
- **Improper wage deductions**
- **Untimely wage payments**



# Wage & Hour Class/Collective Actions: The Flood Continues

- Of 7,312 class/collective action lawsuits filed in federal or state court in 2010, 6,052 (or **approx. 83%**) were wage and hour related complaints



# FLSA Violations Are Extremely Expensive

- Significant recent verdicts/settlements paid by employers:
  - \$172 million (Wal-Mart)
  - \$100 million (Starbucks)
  - \$89 million (UBS)
  - \$78 million (Wal-Mart)
  - \$65 million (IBM)
  - \$53 million (Albertson's)
  - \$38 million (24-Hour Fitness)
  - \$32.9 million (Huntington (CA) Memorial Hospital)

# FLSA Lawsuits Have Become a Cottage Industry

[www.overtimelawyer.com](http://www.overtimelawyer.com)

[www.paymyovertime.com](http://www.paymyovertime.com)

[www.overtimepay.com](http://www.overtimepay.com)

[www.overtimecases.com](http://www.overtimecases.com)

[www.overtimelawyer.net](http://www.overtimelawyer.net)

[www.flsa.com](http://www.flsa.com)

[www.texasovertime.com](http://www.texasovertime.com)

[www.flsalaw.com](http://www.flsalaw.com)

[www.overtimewageclaims.com](http://www.overtimewageclaims.com)

# DOL Wage Settlement Database Now Available Online!

- DOL now publishing, on a quarterly basis, an updated database regarding closed investigations
- Includes, for example:
  - Name of employer
  - Number of FLSA violations/employer
  - Amount of “agreed to” back wages
  - Type of violation
- <http://ogesdw.dol.gov/search.php>



# Arbitration Considerations: Pros and Cons



# Rent-A-Center West

Issue: Whether a district court or an arbitrator should decide claims that an arbitration agreement under the FAA is unconscionable, when the parties to the agreement have clearly and unmistakably assigned this “gateway” issue to the arbitrator for decision.

Holding: The court sided with business. Writing for the majority, Justice Antonin Scalia reasoned that so long as an arbitration agreement delegates the decision regarding unfairness to the arbitrator, it should be the arbitrator rather than the court who decides whether an arbitration clause is unconscionable.

# Granite Rock

**Issue:** Whether a court or arbitrator should decide when a contract containing an arbitration clause was initially formed.

**Holding:** Supreme Court found that the district court correctly decided when the contract was formed. Absent an agreement committing issues of arbitrability to the arbitrator, the court must resolve any issue that calls into question the specific arbitration clause that a party seeks to have the court enforce.

# NLRB

## General Counsel Memo GC-10-06

- Issued on June 16, 2010
- Applies to nonunion employees!!
- In order for a class action waiver to be valid, it must contain specific language
- Employee retains the right to exercise Section 7 rights; and
- Employees will not be retaliated against for concertedly challenging class action waiver by filing class or collective actions
- But, employer may enforce its class action waiver

# NLRB

## General Counsel Memo GC-10-06 – Practical Effect

- Class Action Waivers, if done properly, can be enforced without violating an employee's rights under the National Labor Relations Act
- An arbitration agreement that contains a class action waiver, but not the necessary Section 7 language and anti-retaliation language is subject to attack under the NLRA, and may be invalidated

# *AT&T Mobility v. Concepcion* Case

Issue: “Whether the Federal Arbitration Act prohibits states from conditioning the enforcement of certain arbitration agreements on the availability of class-wide arbitration procedures”

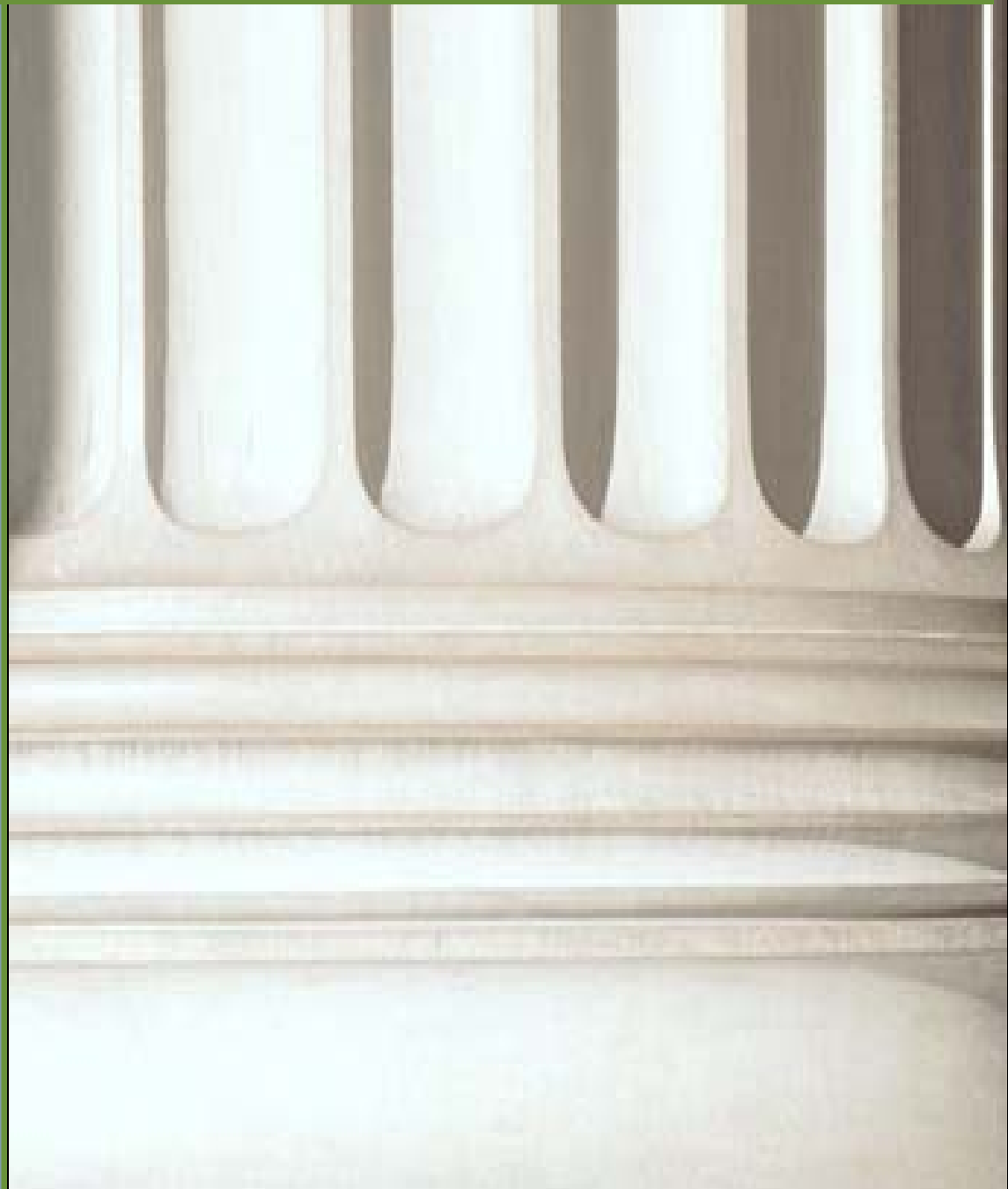
Holding: California law limiting the enforcement of class action waivers in arbitration agreements “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”

# *AT&T Mobility v. Concepcion*

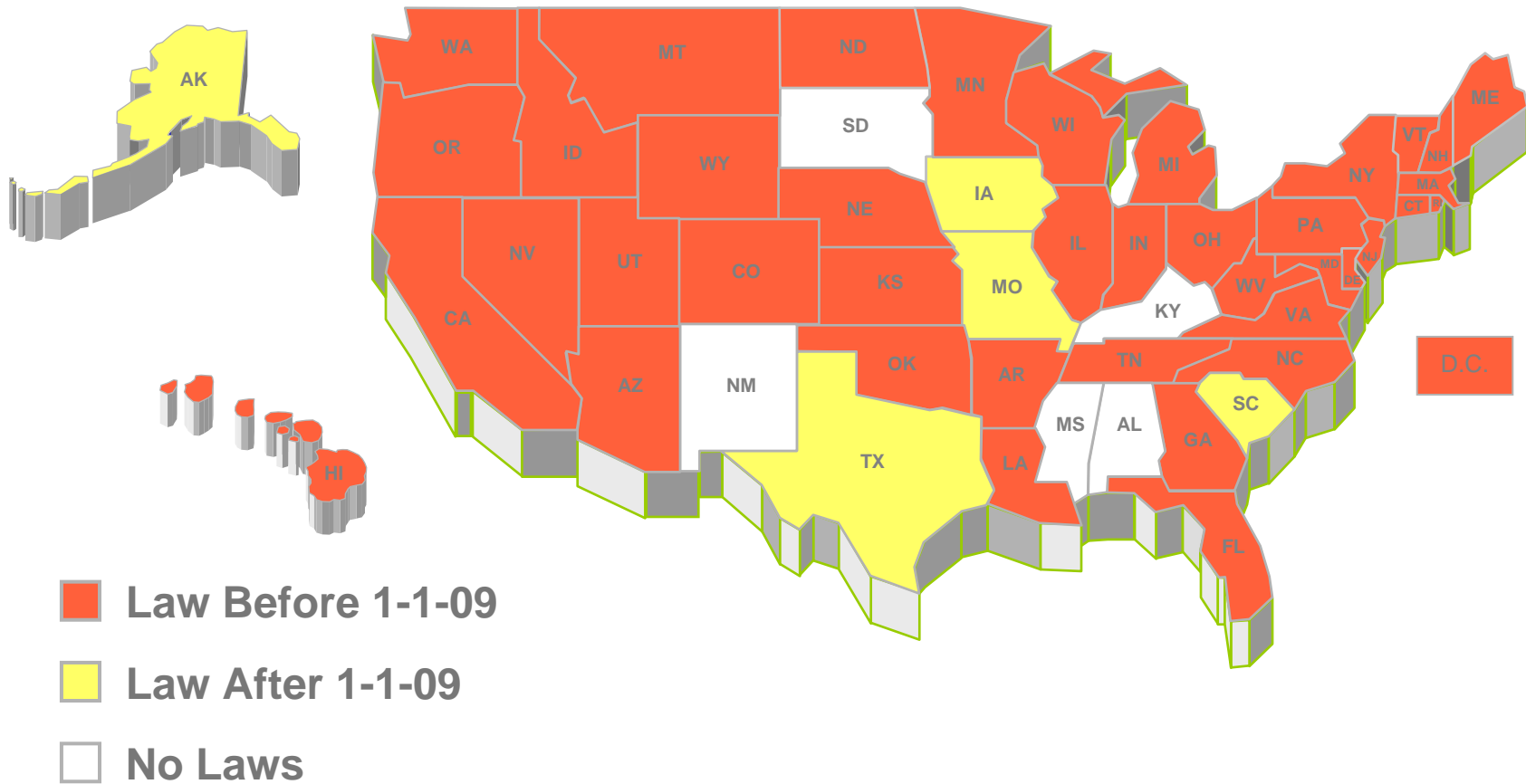
## Case General Effect

- Class action waivers are presumptively enforceable
- Holding should apply equally to employment context
- California law hostile to arbitration is rejected

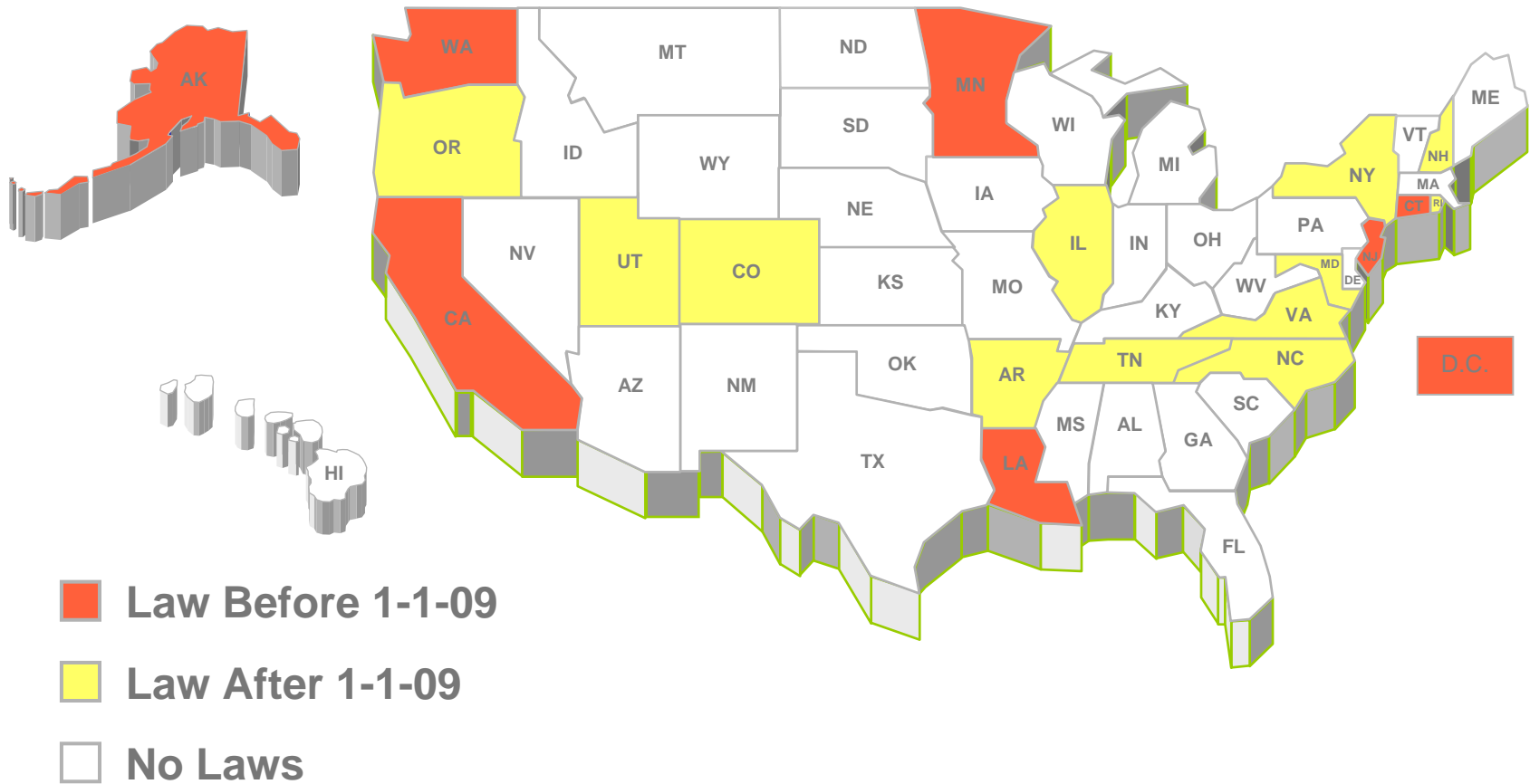
# New State Legislation



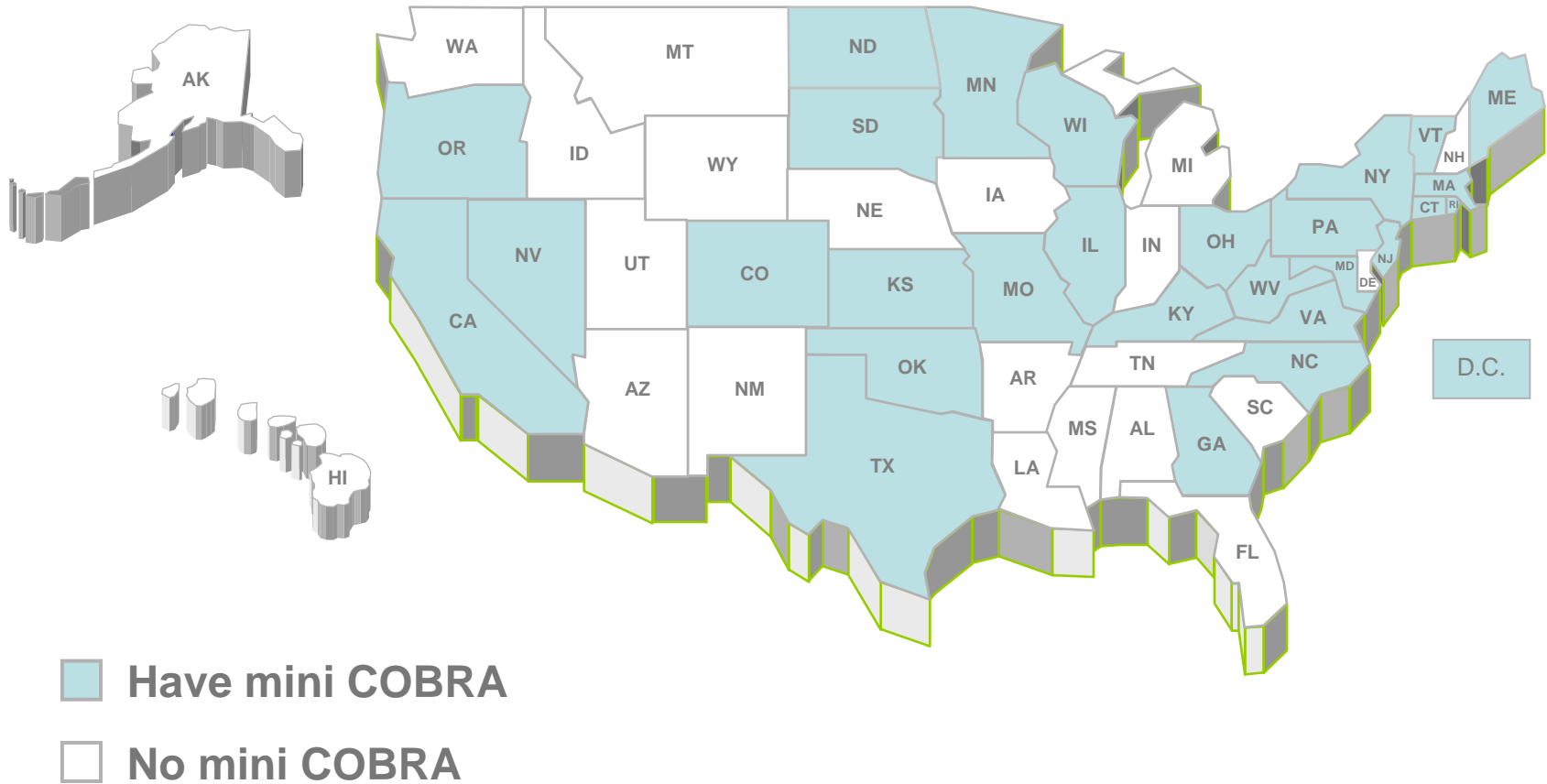
# Data Security Breach Notification Laws



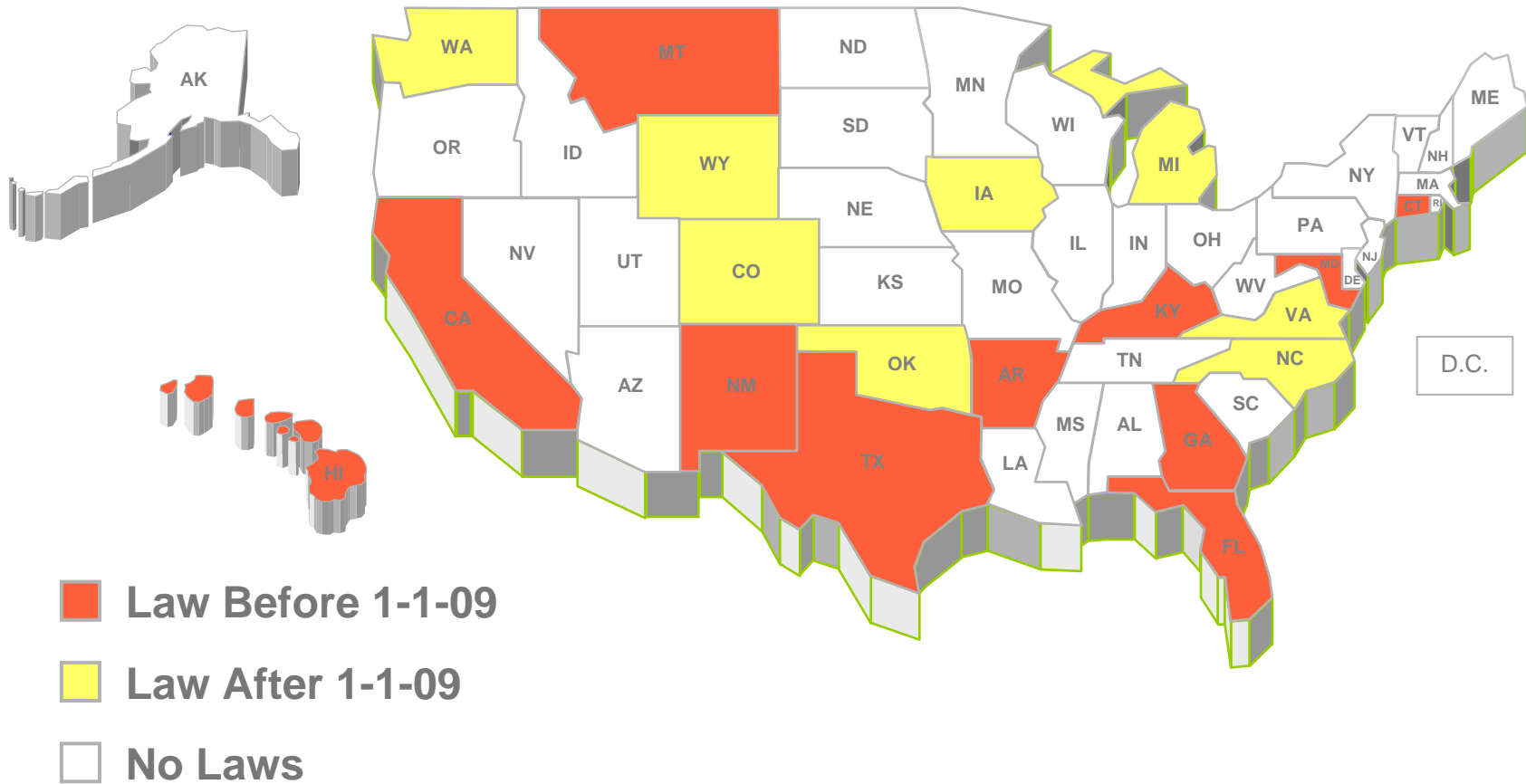
# States with *No Texting While Driving Statutes*



# States with a Mini COBRA: Which was Amended Due to the Federal COBRA Subsidy in the ARRA



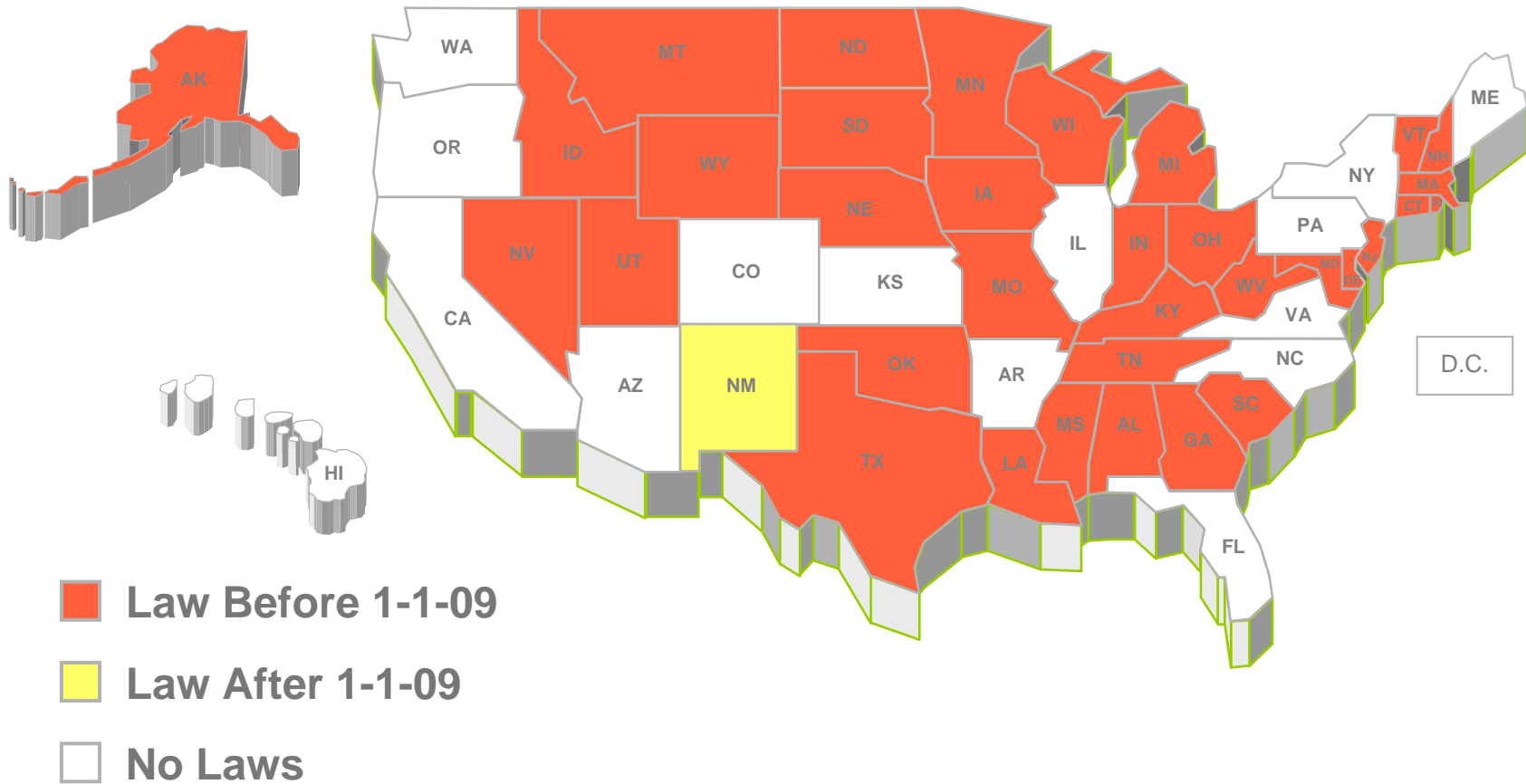
# Unemployment Benefits for Military Spouses



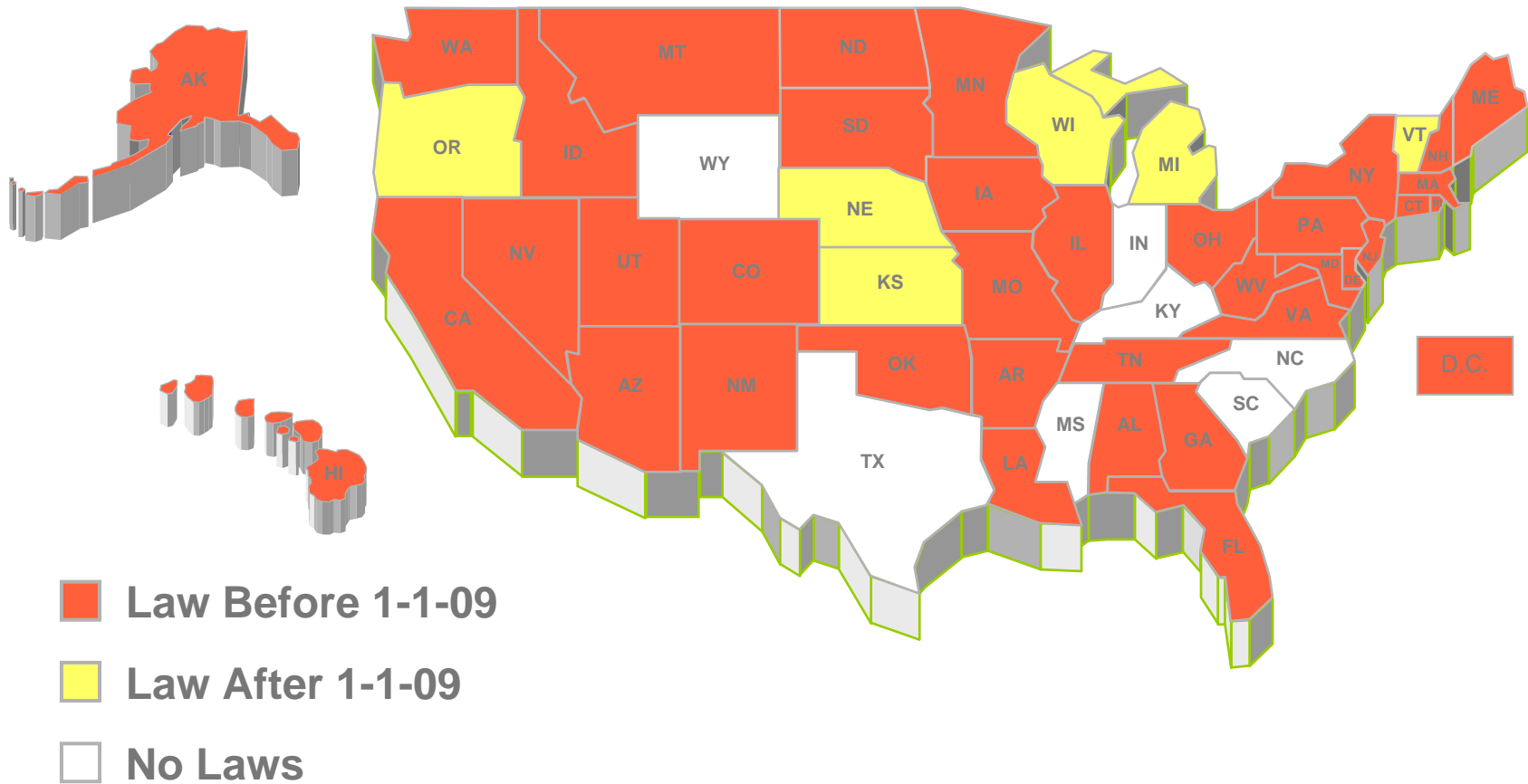




# Protects Leave for Domestic Violence



# Smoking Prohibition in the Workplace





# Questions?

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*Thank You*

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