

## NLRB

# The Future – Preparing for the National Labor Relations Board's Next Steps

### **Fred Lewis**

Baker Donelson

265 Brookview Centre Way

Suite 600

Knoxville, TN 37919

865.549.7128

[flewis@bakerdonelson.com](mailto:flewis@bakerdonelson.com)

### **Steven Trent**

Baker Donelson

100 Med Tech Parkway

Suite 200

Johnson City, TN 37604

423.928.0181

[strent@bakerdonelson.com](mailto:strent@bakerdonelson.com)



---

February 5, 2014 NLRB issued proposed amendments to “Rules and Regulations” governing election procedures.

Identical to June 20, 2011 proposal that became final in December, 2011, although some portions were deferred.

3-2 vote, along party lines.

2011 amendments stalled by Court ruling based on lack of valid quorum.

**APPROVED**

---

Board abandoned appeal in December 2013, but we knew what was coming.

With new Board members approved, Notice of Proposed Rule-Making published February 6, 2014.

Per the NPRM, the proposal “presents a number of changes...aimed at modernizing processes, enhancing transparency and eliminating unnecessary litigation and delay”.



---

Deadline for public comment on proposed rule was April 4, 2014, which Board refused to push back.

Board held required public hearing April 10 and April 11, 2014.

Despite huge amount of comments and controversy, the new rule is expected to become final this Fall.

---

Absent a court injunction, the rules will then be in place.

Rules will apply to both certification and decertification elections.



---

Currently elections normally scheduled within 42 days of filing of petition.

New rules would allow elections as early as 10 days after petition, but 21 days is likely average.

---

## Much more than just timing changes - the election process is also altered

- Pre-election hearings on election issues to be conducted within 7 days of petition.
- Employer must file comprehensive SOP not later than hearing date on all election issues, including unit composition, date, time, and place of election;
  - Must also include for the proposed unit employees: names, work locations, shifts, and job classifications.

# Hearing

---

Any issues not raised at hearing cannot be raised in future.

Hearing Officer is to limit evidence at hearing – no evidence allowed on an issue unless party shows by offer of proof there is a genuine issue of material fact.

Disputes over inclusion of individual employees not to be litigated at hearing.



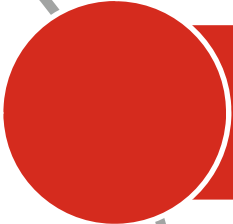
## Hearing (continued)

---

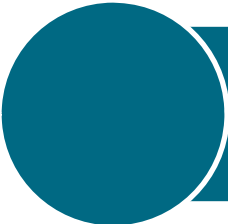
In fact, proposed rules say that only questions involving more than 20% of the potential voters may be litigated at the hearing.

Effectively postpones resolution of many eligibility issues e.g. supervisory status, until after election, if ever.

---



As at present, after Hearing, Regional Director to issue direction of election specifying type, date, time and place.



Unlike current procedures, no appeal possible to NLRB of RD's election decisions before election held.



Voters will be subject to challenge as now, but many more challenged ballots and confusion expected.

---

Any appeal to  
NLRB from RD's  
rulings will be  
post-election,  
and wholly at  
NLRB's  
discretion.

# Excelsior Lists Changes

---

Must be filed within 2 days after D&D instead of current 7.



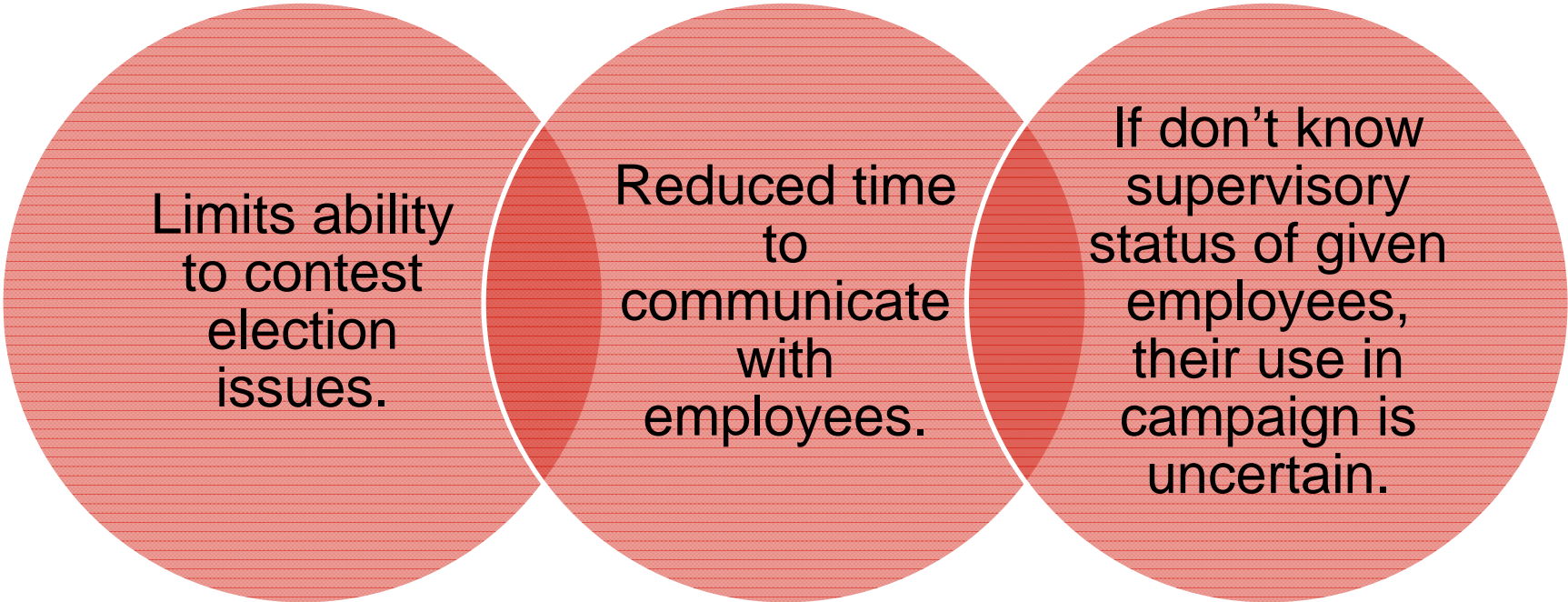
Must be in electronic form.



Unlike current requirements, must include employees' email addresses and telephone numbers, as well as work locations, shifts and job classifications.

# Impact on Employers

---



Limits ability  
to contest  
election  
issues.

Reduced time  
to  
communicate  
with  
employees.

If don't know  
supervisory  
status of given  
employees,  
their use in  
campaign is  
uncertain.

# What to Do?

---

Maintain positive  
employee  
relations;

Hire a labor  
attorney now;

Train managers  
and employees;

Analyze unit  
composition issues  
and make changes  
while you can;

Clearly  
denominate  
supervisors where  
possible;

Draft campaign  
communications.

# The Persuader Rule

---

What is it,  
and why  
should I  
care?


---

50 years ago Congress concerned about consultants who secretly infiltrated a workplace to persuade employees away from unionizing.

Section 203 of the Labor Management Reporting and Disclosure Act requires employers and consultants to report certain activities .



---



Persuader activities concern “the right to organize and bargain collectively” when performed with employees OR when related information given an employer

LMDRA has exception for “advice”

- No report required if just give advice to an employer

---

Pending proposed regulations would drastically limit advice exemption

Proposed new interpretation: attorneys and consultants must report if they “draft, revise, or provide” employee communications

Moreover, disclosure requirements expanded to include all forms of “protected, concerted activity” e.g. supervisory training and drafting policies with an object to persuade employees

---

## Proposed rule seeks to change definition of “advice”.



Currently, if employer is free to accept or reject prepared materials, the advice exception applies;



Under new definition, any document distributed to employees triggers reporting requirements even if consultant or attorney has no contact with employees.

# ABA Objections

---

Infringes on employer's right to counsel

Infringes on attorney client relationship

Requires disclosure of confidential client information

- Existence of client-lawyer relationship
- Description of the legal tasks performed
- Amounts charged for services

---

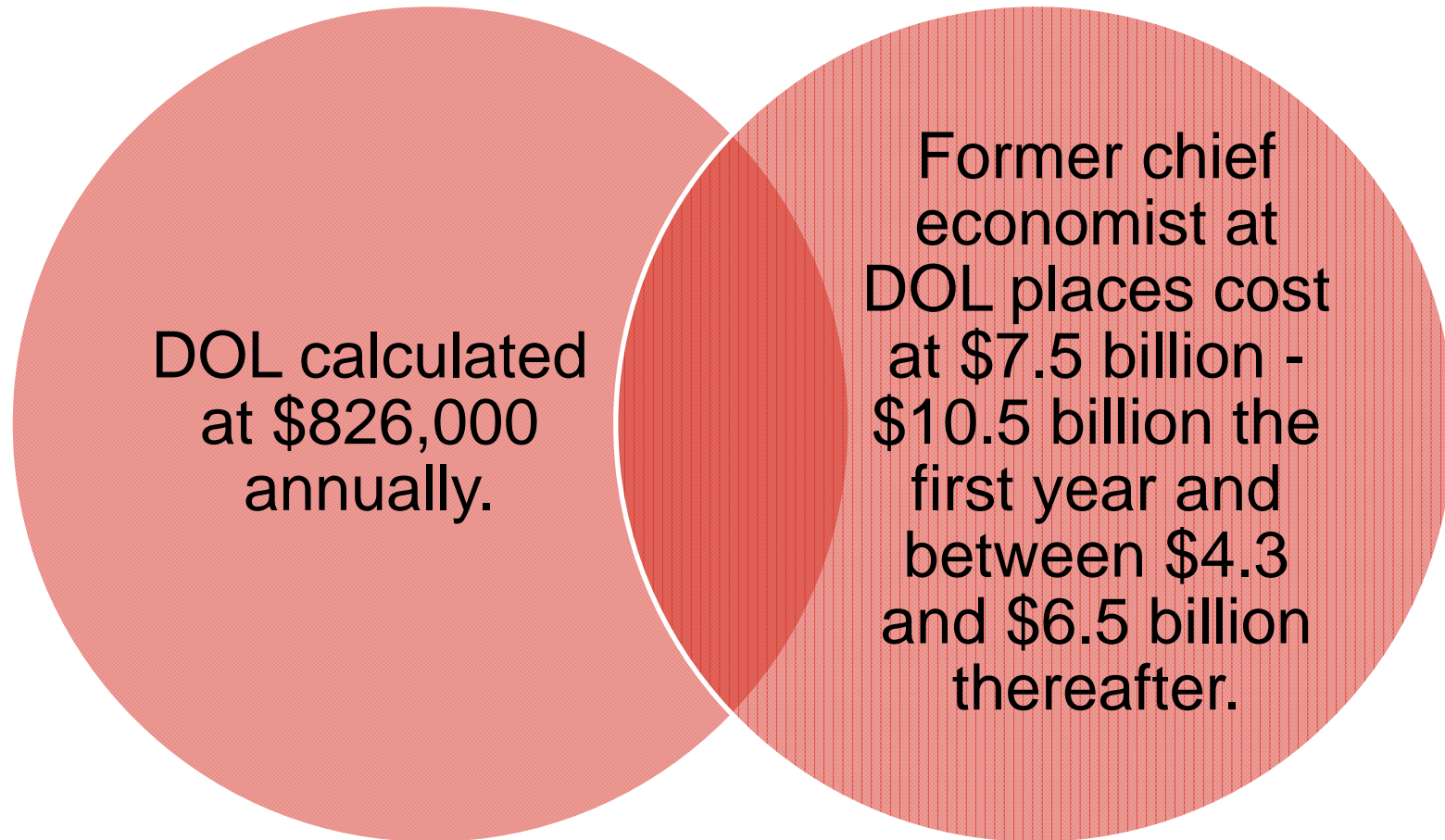
Law firm that qualifies as a “persuader” is required to report all L&E clients, even if no persuader services performed for client

Law firms may well stop providing “persuader” services to maintain confidentiality of clients

Skeptics maintain the regs were drafted to stop firms from providing such “persuader” services and increase unionization

# Cost of Compliance

---



---

House Committee  
on Oversight and  
Government Reform  
identified rule as one  
of 18 proposed regs  
that would “choke  
economic expansion  
and job growth.”

## Current Status

---

Final rule was scheduled for March, delayed without explanation.

According to White House's Unified Agenda, rule is to become final in December, 2014.



# Assessing Employer Policies

---

- In assessing an employer’s policies, the NLRB analyzes whether the rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”
- If the rule explicitly restricts protected concerted activity, it is unlawful.
- If the rule does not explicitly restrict protected concerted activity, it is unlawful if:
  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.



# Confidentiality Policies

---

- Employees have a protected right to communicate with each other regarding their own wages or their co-workers' wages.
- Confidentiality policies cannot prohibit discussion or communication of employee wages or terms and conditions of employment.
- The NLRB takes the position that confidentiality policies cannot be so broad that an employee would reasonably interpret the policy as prohibiting the discussion of wages or terms and conditions of employment.
- Employers often include “personnel information” or “financial information” in their definition of confidential information.
- Employers may prohibit employees from disseminating confidential information that the employee learns by virtue of the employee’s job responsibilities. (Example: a payroll clerk could not share salary information that he learned in the course of processing payroll).



## Confidentiality Policies (continued)

---

### Recent NLRB Examples:



*Target Corp.*, 359 NLRB No. 103 (2013).

- NLRB found Target's confidentiality policy unlawful because it prohibited the disclosure of "confidential information," which it defined as "any nonpublic information," including "personnel records."



*Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012).

- NLRB found the employer's confidentiality policy unlawful because it prohibited the disclosure of "personnel information."

# Confidentiality of HR Investigations

---

- The NLRB has held that an employer cannot have a “blanket approach” or rule requiring employees to keep information relating to a human resources investigation confidential. *Banner Health Systems*, 358 NLRB No. 93 (2012).
- “To justify a prohibition on the discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights.”
- The employer’s “generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees’ Section 7 rights.”



## Confidentiality of HR Investigations (continued)

---

The NLRB held that the employer must assess on a case-by-case basis whether:

- A particular witness needs protection.
- Evidence is in danger of being destroyed.
- Testimony is in danger of being fabricated.
- The confidentiality instruction is necessary to prevent a cover-up.

It is the employer's burden to prove that one of these factors justifies a confidentiality instruction in a particular case.

## Confidentiality of HR Investigations (continued)

---

- The NLRB GC's Office has issued an Advice Memorandum containing an approved policy for confidentiality in the context of HR investigations:
  - The Company has a compelling interest in protecting the integrity of its investigations. In every investigation, the Company has a strong desire to protect witnesses from harassment, intimidation, and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. **The Company may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If the Company reasonably imposes such a requirement and you do not maintain such confidentiality, you may be subject to disciplinary action up to and including immediate termination.**

# NLRB's Take on Social Media Policies

---

May 30, 2012 report of the NLRB's Acting General Counsel provides clearest guidance to date on what NLRB believes constitutes a lawful social media policy. The report reiterates that work rules violate NLRA if they “would reasonably tend to chill employees in the exercise of their Section 7 rights.”

The report further states that “rules that clarify and restrict their scope by including examples of clearly illegal and unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”



**What policies have been found to “cover protected activity?”**

# Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371

---

Issued September 7, 2012. Case 34–CA–012421.

First Decision from NLRB invalidating social media policy and applying General Counsel's guidance.

Costco's electronic posting rule, found in its employee handbook, prohibited employees from making statements that "damage the Company, defame any individual or damage any person's reputation."

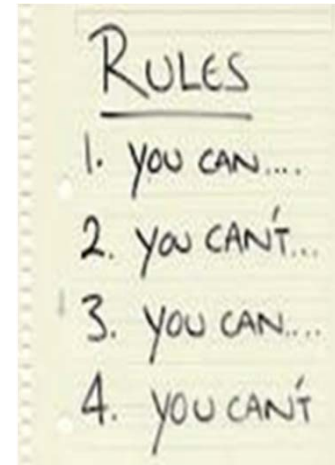
NLRB found Costco's policy overly broad, concluding that "the rule would reasonably tend to chill employees in the exercise of their [NLRA] Section 7 rights," as employees would "reasonably construe the language to prohibit Section 7 activity."



# Employer Policies Found to be Unlawful by the NLRB's General Counsel

---

- Prohibition of “disparaging remarks when discussing the company or supervisors.”
- Prohibition of employees posting pictures that depict the company, the company’s uniform or the company’s logo.
- Prohibition of “offensive conduct” and “rude or discourteous behavior.”
- Prohibition of “inappropriate discussions” about the company, management or co-workers.
- Prohibition of “using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.”



## Employer Policies Found to be Unlawful by the NLRB's General Counsel (continued)

---

- Prohibition of “communications or posts that constitute embarrassment, harassment, or defamation” of the company or any of its employees.
- Prohibition of “statements that lack truthfulness or that might damage the reputation or goodwill” of the company.
- Prohibition of “talk about company business” on personal social media accounts.
- Prohibition of “posting anything that [the employees] would not want their supervisor to see or would put their job in jeopardy.”
- Prohibition of “use of the employer’s logos and photographs of the employer’s store, brand or product without written authorization.”

# Does the NLRB Think *Any* Policy is Lawful?

---

## May 30, 2012 NLRB Acting General Counsel Report

NLRB found Wal-Mart's social media policy lawful. Wal-Mart encouraged employees to be "fair and courteous" but stated, "Nevertheless, if you decide to post complaints or criticism, avoid using statements...that reasonably could be viewed as malicious, obscene, threatening or intimidating...or that might constitute harassment or bullying."

Examples provided were posts that intentionally harmed another's reputation or created a hostile work environment based on race, sex, disability or religion. The policy prohibited "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."

# Wal-Mart's Social Media Policy

---

Other approved provisions include:

- **Confidentiality:** limited to trade secrets and proprietary information – provided examples.
- **“Be Respectful,” “Fair and Courteous”:** questioned this, but approved because specific, detailed definitions of prohibited conduct were provided.
- Provisions approved without comment include:
  - “Carefully read these guidelines [and other applicable codes and policies] and ensure your postings are consistent . . .”
  - “Make sure you are honest and accurate. . .Never post any information or rumor that you know to be false about [Employer, customers or co-employees].”
  - “Never represent yourself as a spokesperson. . . make it clear that your views do not represent those of [Employer].”

# Social Media Policy Guidelines

---

Confidentiality/proprietary information protections – need examples and definitions.

Prohibitions against inappropriate postings need qualifying language to clarify this means unlawful discrimination, harassment, threats of violence, etc. and not everything an employer doesn't like.

Prohibitions against false information are ok, but be careful not to be so broad that an employee's mistaken belief about a work practice, etc., would be included.

Rules for identifying association with employer and/or representing opinions as the organization's.

## Other Policies

---

An employer may not prohibit “negative comments” or “negativity.”

- *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014).

An employer may not require employees to “represent [the Company] in the community in a positive and professional manner.”

- *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014).

An employer cannot prohibit employees from displaying “an inappropriate attitude or behavior to other employees.”

- *First Transit Inc.*, 360 NLRB No. 72 (2014).

# Solicitation/Distribution Policies

---

- An employer can prohibit employee solicitation during working time.
- An employer can prohibit employee distribution of literature during working time and in working areas.
- “Working time” is a term of art.
  - NLRB takes issue with the use of “working hours,” “company time,” or “business hours.”
- An employer can prohibit non-employees, including non-employee union organizers, from coming onto its property to solicit or distribute literature.
- Policies must be uniformly applied.



# Off-Duty Employee Access to Premises

---

Off-duty employees have a right to solicit and distribute literature in **exterior**, non-working, areas of the employer's premises. (i.e., parking lot, sidewalks, driveway).

This right applies to the facility where the employee works and any other facility of the employer.

The NLRB allows employers to restrict access for "security needs," if the employer can prove a specific security concern, but there is a very high burden on the employer to prove why off duty employees in its parking lot pose a specific security threat.



## Off-Duty Employee Access to Premises (continued)

---

An employer can have a policy limiting off-duty access by employees if:



The policy limits access solely to the interior of the facility.



The policy is clearly disseminated to all employees.



The policy applies to off-duty access to the interior of the facility for all purposes, not just for union activity.

## Off-Duty Employee Access to Premises (continued)

---

- In *Sodexo America, LLC*, 358 NLRB No. 79 (2012), the NLRB emphasized that the policy must restrict **all** off duty access to the interior of the facility.
  - An exception that allowed off duty employees to enter the facility for “company business,” rendered the policy invalid.
  - The practical implication is that if you allow off-duty employees to come into the facility to pick up a paycheck, fill out HR forms, come to company sponsored events, etc., then you will have to allow them into the facility for organizing activity.
- When off duty employees are permitted into the facility, you can restrict their access to nonworking areas.

# E-mail Solicitation

---

- In 2007, in *Register-Guard*, 351 NLRB 1110 (2007), the NLRB held that an employer “may lawfully bar employees' nonwork-related use of its e-mail system.”
- On February 25, 2014, the NLRB’s General Counsel issued a memorandum where he identified strategic priorities and initiatives.
  - Among these strategic priorities and initiatives, the memo identified “[c]ases that involve the issue of whether employees have a Section 7 right to use an employer’s e-mail system.”
  - This suggests that the NLRB’s General Counsel intends to ask the Board to overturn *Register Guard*.



# At-Will Employment

---

In 2012, the NLRB's General Counsel pursued unfair labor practice charges against two employers on the theory that the at-will clauses in their employee handbooks were unlawful.

The NLRB's GC specifically took issue with language that says that "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

The NLRB reasoned that this language could reasonably be construed as prohibiting a contractual relationship, such as a collective bargaining relationship with a union.

One of the NLRB's Administrative Law Judges adopted this theory and found the employer's at will policy to be unlawful. *American Red Cross Arizona Blood Services Region*, 28-CA-23343 (2012).

## At-Will Employment (continued)

---

- In response to public outcry, the NLRB's General Counsel issued two advice memoranda, backtracking from its position on at-will employment policies.
- In *Rocha Transportation*, 32-CA-086799 (2012) and *Mimi's Café*, 28-CA-084365 (2012), the General Counsel held that the employer's at will policies were lawful.
- It distinguished these policies from the *American Red Cross* policy in two ways:
  - The approved policies did not use the word "I." In other words, the approved policies did not require the employee to individually waive any rights.
  - The approved policies did not foreclose the prospect that at-will status could be altered in the future.

## At-Will Employment (continued)

---

### Approved policy:

- The relationship between you and [the Company] is referred to as employment at will. This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.

# Investigatory Witnesses

---

Employees who are represented by a union are entitled to a witness in any investigatory interview that could lead to disciplinary action.

The NLRB has wavered back and forth on whether employees in non-unionized workplaces are entitled to witnesses at investigatory interviews.

Since 2004, employees in non-unionized workplaces have not been entitled to witnesses at investigatory interviews.

The NLRB General Counsel's February 25, 2014, memo outlining his strategic priorities and initiatives identifies the right to an investigatory witness in non-unionized workplaces as an issue under consideration.

This suggests that the NLRB may be urged to re-extend the right to investigatory witness in non-unionized workplaces in the coming year.

# Arbitration Agreements

---

- In *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the NLRB held that an employer could not require employees to enter into an arbitration agreement that contained a class and collective action waiver.
- The NLRB found that employees' rights to collectively pursue claims against the company were "at the core of those protected by Section 7."
- The NLRB's decision in *D.R. Horton* was overturned by the U.S. Court of Appeals for the Fifth Circuit, which reasoned that the protections of the NLRA did not override the protections of the Federal Arbitration Act, under which class and collective claims may be waived.
- The NLRB continues to apply *D.R. Horton*, even after it was overturned by the Fifth Circuit.



# Notice Posting

---

- The NLRB issued a rule that required all employers subject to its jurisdiction to post a notice of rights under the NLRA.
- The poster requirement was scheduled to go into effect on April 30, 2012.
- On April 17, 2013, the U.S. Court of Appeals for the District of Columbia issued an injunction preventing the rule from going into effect.
- The D.C. Circuit later found that the NLRB could not require employers to post the notice because the notice was compelled speech that violated employers' First Amendment rights.
- On January 6, 2014, the NLRB announced that it would not appeal the D.C. Circuit's decision and it would not pursue the notice posting at this time.



# Takeaways

---

- Update your Employee Handbook to ensure compliance.
- Give as many specific examples in your policies as possible.
- Train your managers and supervisors to understand when, where, and how employees are permitted to engage in various types of organizing activities.
- Periodically audit compliance with policies. Policies only protect you if they are consistently applied.
- Once your employees turn to a union, it is too late to update and enforce your policies. Delaying these steps could have consequences.
- Make informed risk assessments. Sometimes business interests outweigh the risk of a NLRB charge.

