

Territory Expanded: The
NLRB Rolls On Breakout Seven

California Strong 2017 Employment Law Conference

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Agenda

- Introduction
- Composition Of The NLRB
- Enforcement Initiatives
- Election Rules
- Electronic Signature Cards
- Expanded Employee Rights
- Forecasts of the NLRB
- The Current State of the NLRB

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Introduction

The NLRB is poised for change under the Trump Administration. It is anticipated that President Trump will appoint at least two, and possibly three, new members to the five-person Board. With at least two potential new Republican appointees, employers can expect a more business-friendly NLRB.

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Composition of The NLRB

- Poised to have a Republican Majority in the New Administration
- Functions of the NLRB
- The Role of General Counsel of the NLRB



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General Counsel Enforcement Initiatives

- New General Counsel is Likely to Abandon Some Current Enforcement Initiatives
 - McDonald's Unfair Labor Practice Litigation
 - Walmart Intermittent Strike Litigation
- U.S. Supreme Court ruling in *NLRB v. SW General, Inc.*, Case 15-1251 (March 21, 2017) and Impact on Policy Initiatives Begun Under Former "Acting General Counsel"


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Class Action Waivers in Arbitration

- *D.R. Horton, Inc.* (2012) 375 NLRB 184
- *Murphy Oil USA* (2014) 361 NLRB No. 72
- *Countrywide Financial Corp.* (2015) 362 NLRB No 165
- Split in Federal Appellate Court Decisions Concerning Class Action Waivers
- The Supreme Court Will Decide Validity of Class Action Waivers under the NLRA in the Next Term

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Quickie Election Rules



- In December 2014, the NLRB implemented its Final Rule on Quickie Elections.
- The Quickie Election Rules, which went into effect in April 2015 are regulations that sped up the union election process.
- The Quickie Election Rules have not had much impact on the number of elections or union win ratio.

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Electronic Signature Cards

Signature

New Policy of NLRB General Counsel Griffin in 2015	Electronic Signature Cards have Spawned New Forms of Organizing
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Handbooks

- ✓ Current NLRB Highly Regulatory of Employee Handbook Provisions
 - ✓ *Hills and Dales General Hospital* (2014) 360 NLRB No. 70
 - ✓ *Direct T.V.* (2013) 359 NLRB No.4
- ✓ Handbook Rules Likely Deemed Lawful by NLRB under Trump Administration
- ✓ Social Media Policies Likely Deemed Lawful by the NLRB Under the Trump Administration

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Expanded Employees' Rights Regarding Company Email

- *Purple Communications* (2014) 361 NLRB No. 126

Forecast Under the Trump Administration: It is expected that the NLRB will be called upon to revisit and clarify the *Purple Communications* ruling to prevent interference with the business of employers nationwide

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Substantial Limits on What Constitutes Social Media Misconduct




- NLRB highly protective of employee posts on social media.
- *Triple Play Sports Bar and Grille* (2014) 361 NLRB No. 31
 - Termination for Facebook posting about management withholding practices
- *Pier Sixty* (2015) 362 NLRB No. 59
 - Posted a message on personal Facebook page about manager and union vote

Forecast Under the Trump Administration: It is expected that the NLRB will hold that corporate disparagement not connected to a strike will be grounds for discipline. The NLRB will most likely allow an employer to discipline employees based on the business interest of its public image over social media.

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NLRB Expanded Joint Employer Liability




- *Browning-Ferris* held that an employee can establish joint employer status by either
 - a) The alleged joint employer reserved authority to control the terms and conditions of employment; or
 - b) Exercised indirect control over the terms and conditions of employment.

Forecast Under the Trump Administration: It is anticipated that the NLRB will revisit its holding in *Browning-Ferris* and hold that direct and immediate control over terms and conditions of employment will be required.

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Creation of Micro-Unions




- *Specialty Healthcare* (2011) 357 NLRB No. 83
 - NLRB made it substantially easier to unionize workplaces
 - Creation of "micro-unions" or the unionization of sub-units of a workforce.

Forecast Under the Trump Administration: Expect the new NLRB to revisit its decision in *Specialty Healthcare* and overrule the approval of micro-units as a collective bargaining unit.

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Witness Statements




- *Piedmont Gardens* (2015) 362 NLRB No. 139
 - NLRB held employer must provide witness statements obtained by the employer in response to a union request for information pursuant to a grievance investigation

Forecast Under the Trump Administration: Forecast Under the Trump Administration: Expect a reversal of this rule by the NLRB.

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Protected Concerted Activity ("PCA")




- *Fresh & Easy Neighborhood Market, Inc.* (2014) 361 NLRB No. 12
 - Employee who requested help from coworkers in preserving evidence for sexual harassment complaint was engaged in "concerted activities" for mutual aid and protection under Section 7 of the NLRA.

Forecast Under the Trump Administration: Expect reversal of this broad definition of "protected concerted activity." We anticipate the NLRB will revisit its holding in *Fresh & Easy* and limit the terms "protected concerted activity" activity to related to unionization, bargaining, or a "group grievance" of working conditions.

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Picketing



- *Capital Medical Center* (2016) 364 NLRB No. 69
 - Split panel held that off duty employees of an acute care hospital had the right to picket.
- Hospital violated Section 8(a)(1) of the NLRA by attempting to prevent the off-duty employees from picketing, threatening the employees with discipline and arrest for picketing, and contacting the police.

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Conclusion



What's on the Horizon

Employees expect a more business friendly NLRB under the Trump administration that will seek to overturn many of the labor friendly policies that the NLRB effected under the Obama administration. For example, we anticipate the new NLRB to overrule the employer standard established in Browning-Ferris, and to consider overturning the Quickie Election Rules, among other decisions and rules that will be overturned. The new NLRB will likely be called upon to revisit the current NLRB's lack of interest in conduct disruptive to employers such as picketing, the use of stationary banners, and the use of inflatable devices such as rats that are designed to generate negative public attention to advance the unions' interests against employers.


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Question & Answer Session

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