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Unique Labor and Employment Law Issues In Retail – *Don't Sell Yourself Short*

Valerie Butera
Susan Gross Sholinsky
Joshua A. Stein
Steven M. Swirsky

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Presented By

Valerie Butera
vbutera@ebglaw.com
(202) 861-5325

Susan Gross Sholinsky
sgross@ebglaw.com
(212) 351-4789

Joshua A. Stein
jstein@ebglaw.com
(212) 351-4660

Steven M. Swirsky
sswirsky@ebglaw.com
(212) 351-4640

Agenda

1. Americans with Disabilities Act (ADA)
2. Occupational Safety and Health Administration (OSHA)
3. Employment Policies, Practices, and Procedures
4. Labor Management Relations

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Accessibility

Title III of the ADA

WHO IS COVERED?

- Governs **places of public accommodation**
  - Own, operate, control, lessor/lessee
  - Joint and several liability
- Places of public accommodation include:
  - inns, hotels, motels, or other places of lodging;
  - restaurants, bars, or other establishment serving food or drink;
  - a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
  - an auditorium, convention center, lecture hall, or other place of public gathering;
  - **a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;**

Title III of the ADA

WHO IS COVERED?

- **a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station,** office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- a terminal, depot, or other station used for specified public transportation;
- a museum, library, gallery, or other place of public display or collection;
- a park, zoo, amusement park, or other place of recreation;
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Title III of the ADA

A CIVIL RIGHTS LAW

- Title III guarantees individuals with disabilities the "**full and equal enjoyment** of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" (42 U.S.C. § 12182(a))
- General Prohibitions
  - Denying participation or the opportunity to participate;
  - Providing unequal benefits;
  - Providing separate benefits
    - Not having an integrated setting; and
  - Discrimination because of a relationship or association with an individual with a disability.

Title III of the ADA

SPECIFIC PROHIBITIONS/OBLIGATIONS

- **Cannot utilize eligibility criteria that screen out** individuals with disabilities;
- Requires **Modification of policies, Practices and Procedures** – unless doing so fundamentally alters goods and services provided;
- Requires provision of **Auxiliary Aids and Services** to the extent necessary to achieve **effective communication;** and
- Requires **Barrier Removal.**

State and Local Laws

- Most states and many localities have human rights/anti-discrimination laws prohibiting discrimination on the basis of disability and requiring accessibility in various public entities

Accessible Technology

Website Accessibility

Title III of the ADA

APPLICATION

- Title III prohibits places of public accommodation from discriminating on the basis of disability
  - Requires **"full and equal enjoyment"**
  - *However,* it does not explicitly define whether a place of public accommodation must be a physical place or facility, nor does it directly address whether it could be read or interpreted to apply to a non-physical place or facility
- Currently, tension exists regarding whether Title III applies to websites and, to a lesser degree, if it does, what it means to be accessible
  - Court decisions on the issue – both generally and specific to websites – have been decided both ways
  - Presently, no universally required standards for achieving web accessibility for most places of public accommodation
    - Federal agencies and some federal contractors in limited circumstances under Section 508 of the Rehabilitation Act;
    - Air Carrier Access Act;
    - 21st Century Communications & Video Accessibility Act

Title III of the ADA

SCOPE OF COVERAGE: THE CURRENT JUDICIAL LANDSCAPE

- **Strict construction:** holding "Places of Accommodation" are limited to physical places
  - Courts in 3rd Cir.; 6th Cir.; and 9th Cir.
- **Spirit of the law:** holding that "Places of Accommodation" are not limited to physical places
  - Courts in 1st Cir.; 2nd Cir.; and 7th Cir.
- **Nexus:** holding that Title III applies when there is a sufficient connection between the goods and services of traditional "Places of Accommodation" (*e.g.*, a retail store) and the alternative consideration (*e.g.*, website)
  - Courts in 9th Cir.

Key Decisions Directly Addressing Title III's Applicability To Websites

- ***Nat'l Federation of the Blind vs. Target Corp.* (N.D. Cal. 2006)**
  - Addressed whether Title III covers only physical "brick and mortar" structures or does it also cover the internet
  - NFB alleged that Target violated Title III, California's Unruh Act, and California's Disabled Persons Act because Target.com – which offered a variety of store-related services – was inaccessible to the blind and thus Plaintiffs were denied full and equal access to Target stores
  - Target asserted that the ADA and California state laws only cover access to physical spaces, such as Target's brick-and-mortar stores, and that Target.com is not a physical space and thus not a "place of public accommodation"
    - Also asserted that Plaintiffs were not denied full and equal access to the Target stores because the services were provided via alternative means

Key Decisions

TARGET

- The Court held that Title III covers websites in situations where a **nexus** exists between the website and a physical place of public accommodation
  - "The statute applies to the services ***of*** a place of public accommodation, not services ***in*** a place of public accommodation"
- Many of the benefits and privileges of Target's website – such as online information about store locations and hours and printable coupons that are redeemed in the stores – were "heavily integrated with the brick-and-mortar stores"
- Did not rule on whether alternative measures provided by Target (*e.g.*, telephone line, in-store assistance) were effective alternatives
- Regarding the state law claims, the Court found that, since the plaintiffs stated a claim under the ADA and ADA claims are per se claims under the Unruh Act and the DPA, it would not reach Target's challenges to the plaintiffs' state law claims
  - Nevertheless, the Court stated in dicta that part of plaintiffs' claim was "that Target.com is a service of a business establishment, and therefore defendant's argument that a website cannot be a business establishment is unavailing"

Key Decisions

TARGET

- Ultimately resulted in a court-approved class settlement agreement in which Target agreed to:
  - Establish a $6 million fund from which members of the state settlement class could make claims;
  - Take the steps necessary to make its website accessible to the blind by early 2009 and obtain "certification" from NFB;
  - Pay NFB to train all its employees who work on its website; and
  - Pay attorneys' fees and costs

Key Decisions

THE POST-*TARGET* LANDSCAPE

- Increased (threats of) litigation on this issue
- Significant number of settlements and "cooperative agreements" (*e.g.*, via "structured negotiations") between advocacy groups and/or state and/or federal government agencies and major companies regarding website accessibility
- Increased attention from DOJ and other Regulators
- Heavy reliance upon the World Wide Web Consortium/Website Accessibility Initiative's Web Content Accessibility Guidelines

Key Decisions

POST-*TARGET* LITIGATION

- ***Ouellette v. Viacom* (D. Mont. Mar. 31, 2011):** the court dismissed claims against Google.com, YouTube.com and MySpace.com on the grounds that, "[n]either a website nor its servers are 'actual, physical places where goods or services are open to the public,' putting them within the ambit of the ADA"
- ***Young v. Facebook, Inc.* (N.D. Cal. May 17, 2011):** the court restated that websites on their own do not constitute places of public accommodation under Title III and, therefore, a "nexus" must exist between a website's services and a physical place of public accommodation for Title III obligations to apply to the website; "**Facebook operates only in cyberspace, and is thus is [sic] not a 'place of public accommodation**;' as construed by the Ninth Circuit. While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which Young claims she was denied access are offered to the public"
- ***Earll v. eBay, Inc.* (N.D. Cal. Sept. 7, 2011):** the ADA could not afford a remedy to plaintiff because its definition of "places of public accommodation" is limited to actual physical spaces, plaintiff could assert an independent Unruh Act claim because **"[b]oth the Unruh Act and the [Disabled Persons Act] apply to websites 'as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively.** No nexus to . . . physical [places] need be shown'"

Key Decisions

POST-*TARGET* LITIGATION

- ***Jancik v. Redbox Automated Retail, LLC* (C.D. Cal. May 2014):** the Court granted Defendant's motion to dismiss and held, among other things, that Redbox did not have to caption its library of web-based videos because a website is not a place of public accommodation under Title III
- ***National Federation of the Blind et al. v. Scribd* (D. Vermont, March 2015):** the Court rejected Defendant's motion to dismiss finding that the language of Title III, the ADA's legislative history (embracing a "liberal approach"), and DOJ's interpretation of the ADA all suggest that it can apply to establishments that offer goods and services to the public even if they do not have a physical location

Netflix Cases: Impact of the Circuit Split

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

- ***Nat'l Assoc. of the Deaf v. Netflix, Inc.* (D. Mass. June 19, 2012)**
  - Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
  - The court held that 1st Circuit precedent, Congressional intent, and the plain language of the ADA clearly supported a finding that accessibility obligations are not limited to physical places:
  - "***Carparts*'s reasoning applies with equal force to services purchased over the Internet**, such as video programming offered through the Watch Instantly web site. In a society in which business is increasing conducted online, **excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes and would severely frustrated Congress's intent** that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'"
    - **"The ADA covers services 'of' a public accommodation, not services 'at' or 'in' a public accommodation"** (citing *Target*)

Netflix Cases

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

- Netflix's Watch Instantly website could fall into several categories listed in the ADA:
  - "service establishment": provides customers with the ability to stream video programming over the Internet
  - "place of exhibition or entertainment": displays movies, television programming, and other content
  - "rental establishment": engages customers to pay for the rental of video programming

- Entered into a consent decree (Oct. 9, 2012) in which Netflix agreed to, among other things,:
  - 100% of on-demand streaming content has captions or subtitles
  - Captions available within an average of 15 days (by Sept. 30, 2014) and 7 days (by Sept. 30, 2016) after content's on-demand launch
  - Pay **$755,000 in attorneys' fees and costs**
  - Pay NAD **$40,000 for compliance monitoring**

Netflix Cases

CULLEN V. NETFLIX, INC. (N.D. CAL. JULY 2012; 9th Cir. April 2015)

- ***Cullen v. Netflix, Inc.***
  - Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
  - The court held that 9th Cir. precedent controlled, finding that plaintiff could not rely on a violation of the ADA to state *per se* violations of the Unruh Act and the Disabled Persons Act, and granting Netflix's motion to dismiss with leave to amend to state independent causes of action under the Unruh Act and Disabled Persons Act

- "**The Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation.** Because the website is not a place of public accommodation, the ADA does not apply to access to Netflix's streaming library." (citing *Weyer)*
- **On April 1, 2015, the Ninth Circuit held that web-only businesses are not places of public accommodation under Title III.**
  - Explained that the phrase "place of public accommodation" requires, "some connection between the good or service complained of and an actual physical place."

U.S. Department of Justice

- DOJ takes the position that Title III as written applies to the websites of private places of public accommodation:
- "Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that **title III covers access to Web sites of public accommodations**. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. . . ."
  - Preamble, Final rule, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43465 (published Sept. 15, 2010)
- DOJ has made its position clear in various forms:
  - amicus briefs
  - guidance publications
  - letters and testimony before Congress
  - settlements agreements
  - ANPRM (and its hearings)

Thomas Perez, Then Assistant Attorney General, Civil Rights Division, U.S. DOJ

- "Let me be clear. **It is and has been the position of the Department of Justice since the late 1990's that Title III of the ADA applies to Web sites.** We intend to issue regulations under our Title III authority in this regard to help companies comply with their obligations to provide equal access."
- "**Companies that do not consider accessibility in their Web site or product development will come to regret that decision**, because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up."
  - Speaking at Jacobus tenBroek Disability Law Symposium (April 25, 2010)
- "**It is the position of the Department of Justice since the late 1990s that the ADA applies to websites. Companies that do not consider accessibility in their website or product development will come to regret that decision**, because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up."
  - Speaking at the DOJ Celebration of the 22nd anniversary of the Americans with Disabilities Act (July 26, 2012)

The ANPRM

- July 26, 2010 ANPRM – Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government
  - Contemplating amending Title II and Title III regulations
    - Public hearings held throughout Fall/Winter 2010/2011
    - Public comment period ended January 24, 2011
  - Formalizes intent to adopt standards expressly covering websites owned, operated, and controlled by entities covered by Titles II and III
  - Scope of web accessibility standards most likely limited to public accommodations that offer goods and services, either exclusively on the Internet (*e.g.* Amazon.com) or in conjunction with a physical location (*e.g.* Target stores)
- Proposed staggered compliance deadlines
- **NPRM is currently expected to be published prior to the 25th Anniversary of the ADA (July 26, 2015)**
  - Related Section 508 NRPM released in February 2015

Key Settlement Agreements and Partnerships With Advocacy Groups in the Retail Industry

- **Amazon** and National Federation of the Blind (2007)
  - Cooperative agreement to develop and promote technologies that improve web accessibility and take measures to support use of screen-readers

- **Radio Shack** (2007); **Rite Aid** (2008); **Staples** (2009); and **CVS** (2009) each with American Council of the Blind, the California Council of the Blind *et al*.
  - Required substantial compliance with WCAG (specifics varied based on which version of WCAG governed at the time)

Key Settlement Agreements and Partnerships With Advocacy Groups in the Retail Industry

- **Ticketmaster** and National Federation of the Blind (Apr. 2011)
  - Website will be fully accessible to blind users utilizing screen access technology by December 31, 2011
  - Ticketmaster will submit its website to the NFB Nonvisual Accessibility Web Certification program, which is NFB's testing program to ensure that websites remain compliant
- **Square, Inc.** and National Federation of the Blind (2013)
  - Must make mobile applications accessible to individuals who are blind
- **Safeway** (settlement with individual reached via "structured negotiation"; 2013;
  - given until April 15, 2014 to achieve substantial compliance with WCAG 2.0 (A-AA) for ecommerce webpages and Safeway mobile optimized page

DOJ Settlement Agreements

- Even as DOJ settlement agreements begin to regularly require website accessibility, the exact standards/ requirements imposed often differ depending on the context of the investigation and subsequent negotiations.

- **QuikTrip** (July 19, 2010)
  - Required convenience store retail chain to evaluate its website according to "generally accepted standards for website accessibility, such as the Standards promulgated pursuant Section 508 . . ."

- **McNeese State University** (September 10, 2010)
  - Required to make new and modified webpages accessible.

- **Hilton Worldwide Inc.** (Nov. 9, 2010)
  - Hilton agreed to bring its website into compliance with WCAG 2.0, Level A success criteria

DOJ Settlement Agreements

- ***Nat'l Fed. of the Blind v. Law School Admissions Council ("LSAC")*** **(Apr. 25, 2011) (DOJ later joined)**
  - LSAC agreed to ensure that website users who are blind and utilize screen-reader technology are able to obtain the same information and take part in the same transactions as other guests (*e.g.,* register for LSAT; access practice LSAT materials, and submit online law school applications); and
  - Agreed to provide technology that enables participating law schools to add school-specific inquiries in an accessible manner
- **Wells Fargo & Co.** (May 31, 2011)
  - As part of much broader settlement, agreed to continue its ongoing actions regarding website accessibility
  - No standard given – focused on concepts (*e.g.*, screen-reader features; low vision; testing)

DOJ Settlement Agreements

- **The Price Is Right** (Sept. 20, 2011)
  - Price is Right must redesign two websites associated with the show in accordance with many of the requirements set forth in current version of Section 508
- **Quicken Loans Arena**, Cavaliers Operating Co., LLC (Dec. 13, 2012)
  - As part of a broader settlement, the Cavs agreed that its websites – www.cavs.com and www.theqarena.com – will comply with WCAG 2.0, Level AA success criteria within six (6) months
  - Must develop policy to routinely evaluate/remedy any accessibility problems encountered on its websites
- **Louisiana Tech University** (July 23, 2013)
  - New webpages must comply with WCAG 2.0, Levels A and AA; existing webpages since September 2010 by 2014; older webpages upon request

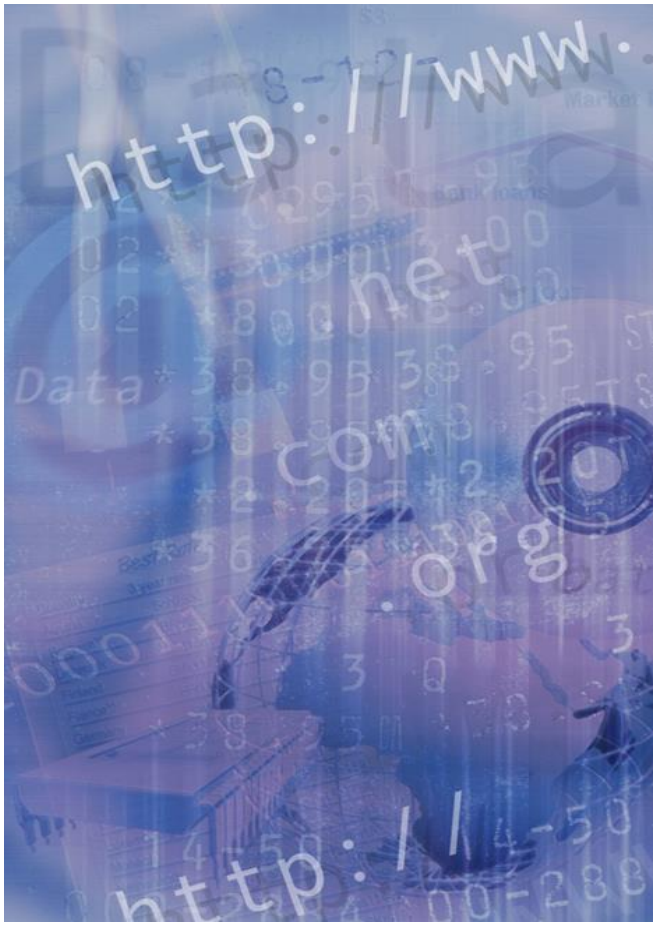
DOJ Settlement Agreements

- **Newseum** (December 2013)
  - Website must be compliant with WCAG 2.0, Levels A and AA within one year.
  - $15,000 in civil penalties.
- **HRB Tax Group, Inc.** (March 2014) (DOJ joined a litigation commenced by the NFB)
  - H&R Block Web site and Online Tax Preparation Product must be made accessible under WCAG 2.0 A and AA by January 1, 2015, with additional accessibility deadlines over the following years of the decree for the other covered applications and content. Also contained various training, policy, and compliance monitoring obligations.
  - $22,500 in damages for each Plaintiff and $55,000 in civil penalties

DOJ Settlement Agreements

- **Peapod** (November 2014)
  - Website and mobile application must be compliant with WCAG 2.0, Levels A and AA within 5 months and 10 months respectively.
  - Commitment to making third-party content accessible.
- **National Museum of Crime and Punishment** (January 2015)
  - Website must be compliant with WCAG 2.0, Levels A and AA within 120 days.
- **Dekalb, Ill.; Vero Beach, Fla.; Fallon, Nev.; Isle of Palms, SC** (February 2015)
  - Job applications/employment websites must be compliant with WCAG 2.0, Levels A and AA within 90-150 days.
- **EdX** (April 2015)
  - Must make its massive online open courses platform (website and mobile applications) compliant with WCAG 2.0, Levels A and AA within 18 months.

State and Local Laws



- Distinct obligations may exist at the state and/or local level that mimic and/or go beyond the scope of 508 and/or the ADA
  - These obligations most often fall under a states' respective public accommodations laws as they relate to government websites
- For such government websites, most states require Section 508 compliance at a minimum, while some require compliance with some iteration of WCAG (1.0 or 2.0)
- A vast majority of states have published their website accessibility guidelines (or policies) on their official state websites

Touch Screen Devices

Touch Screen Devices

BACKGROUND

- Over the past few years, with increasing frequency, retailers have begun to utilize touch screen devices in a variety of contexts. For example:
  - At the point-of-sale ("POS") – *e.g.*, for using debit cards;
  - To provide information to patrons;
  - As part of rental kiosks;
  - For purchasing tickets/product; and
  - Parking.

- Concurrently, plaintiffs and advocacy groups have repeatedly brought class action lawsuits against a "who's who" of retailers and big-box stores in virtually all contexts – *e.g.*, fashion, cosmetics, home improvement, jewelry, electronics, office supplies, and toys – alleging that the touch screen devices are inaccessible and violate the ADA and state/local accessibility laws.

Touch Screen Devices

SOURCES OF SPECIFIC ACCESSIBILITY OBLIGATIONS

- 2010 ADA Standards for Accessible Design – ATMs
  - Clear floor and ground space; reach range; operable parts; speech output; input controls; and display screen orientation
- Section 508 of Rehabilitation Act (February 2015 NPRM) – federal agencies (limited application to government contractors seeking to do business with federal agencies)
- Air Carrier Access Act – shared-use airport kiosks
  - Technical standards cover nearly all aspects of the operation and use of automated shared-use kiosks, including the display screen and operable parts, inputs and outputs, Braille instructions, clear floor space, privacy, and biometrics (drawing upon aspects of both the existing 2010 ADA Standards for ATMs and aspects of the current version of Section 508's standards for self-contained closed products (such as copiers)).

Touch Screen Devices

SOURCES OF SPECIFIC ACCESSIBILITY OBLIGATIONS

- California Financial Code § 13082
  - Creates obligations for the provision of accessible POS touch screen system – both for existing devices and new/modified devices.
  - New/modified – must provide either: (i) a tactile/discernible numerical keypad; or (ii) other technology, such as a radio frequency identification device, or fingerprint biometrics that enables a person with a visual impairment to enter his/her own PIN or any other personal information necessary to process the transaction in a manner that provides the opportunity for the same degree of privacy input and output available to all individuals.
  - Existing – before January 1, 2010, except as provided in paragraph (2), any POS system that includes a video touch screen or any other non-tactile keypad shall also be equipped with a tactually discernible keypad or other technology.
    - At locations equipped with two or less POS machines, only one POS machine shall be required to be equipped with a tactually discernible keypad or other technology on or before January 1, 2010.

Title III of the ADA

- In the absence of any specific requirements in the 2010 ADA Standards, the recent litigations have focused their allegations of inaccessibility on two of Title III's overarching civil rights obligations:
  - Full and Equal Enjoyment; and
  - Provision of auxiliary aids and services to achieve effective communication
- Specifically, the most recent complaints allege that retailers are:
  - Denying patrons who are blind the "full and equal enjoyment" of their shopping experience because by installing touch screen devices that do not provide a tactile keypad, in order to utilize their debit cards via the POS device, patrons who are blind must disclose their debit card PIN to another person (*e.g.*, the sales person).
    - This is framed as an invasion of privacy and forcing patrons who are blind to take additional , disadvantageous, steps to make a purchase.
  - Failing to meet their obligation to provide auxiliary aids and services necessary for patrons who are blind to effectively communicate with store employees when shopping and making purchases.

Title III of the ADA

- Not surprisingly, DOJ has aligned itself with the plaintiffs in these cases.
  - DOJ has gone so far as to file Statements of Interest in ongoing private party litigation to assert its position.
- DOJ firmly takes the position that places of public accommodation – such as retailers – are not relieved of their obligation to provide accessible POS devices just because patrons who are blind has other methods of payment/obtaining services available for use.

- Other lawsuits (also) focus on the design/installation of the touch screen devices.

Litigation and "Structured Negotiation" Settlements

EXAMPLES

- Examples of retailers who have faced complaints of inaccessible POS devices, include:
  - Williams Sonoma;
  - Wawa;
  - Apple;
  - Kay Jewelers;
  - Office Depot;
  - J.C. Penney;
  - American Eagle Outfitters;
  - Lucky Brand Jeans;
  - Express; and
  - Build-A-Bear Workshops.
- Examples of retailers who previously entered into "structured negotiation" settlement agreements:
  - Trader Joes;
  - CVS;
  - Staples;
  - Rite Aid;
  - Wal-Mart;
  - 7-11; and
  - Dollar General.

Accessible Touch Screen Device Considerations

- Traditional accessibility considerations:
  - Accessible route;
  - Clear floor space;
  - Operating mechanisms;
    - Reach range;
    - Usability;
  - Screen mounting height;
  - Protruding objects and detectable warnings.
- Accessible technology – auxiliary aids and services – considerations:
  - Input controls – tactilely discernible input;
  - Speech output – audio instructions;
    - Headset jack;
  - Captioning of non-text audio.
- Alternative/Temporary Measures?
  - Employee assistance

Temporary Obstructions

Temporary Obstructions

BACKGROUND

- As part of Title III's overarching obligations requiring that retailers provide individuals with disabilities with full and equal enjoyment of their goods and services and engage in ongoing barrier removal retailers **must provide and maintain accessible routes** (generally, a minimum of 36 inches in width) **throughout stores, to merchandise, and to locations such as check-out and service counters, restrooms, fitting rooms, and other amenities**.

- Notwithstanding, Title III's implementing regulations and related Technical Assistance Manuals clarify that **isolated and/or temporary obstructions to the accessible route do not constitute violations of the ADA if they are infrequent and promptly removed.**

Temporary Obstructions

CHAPMAN V. PIER 1 IMPORTS – 9TH CIR. MAR. 2015

- Chapman alleged that Pier 1 violated Title III and related state accessibility laws, by, among other things, repeatedly obstructing its aisles with merchandise, furniture, display racks, and ladders.
  - Chapman encountered such obstructions on eleven separate visits to a Pier 1 store.
- In upholding the district court's finding of summary judgment for Chapman on the obstructed aisle issue, the Ninth Circuit rejected Pier 1's argument that these allegations should be excused as mere temporary obstructions and thus, did not violate the law.

Temporary Obstructions

GUIDANCE FROM THE *CHAPMAN* HOLDING

- Adopting policies governing the placement of merchandise to maintain accessible routes, and practices and procedures to help implement those policies (*e.g.*, regular walks of the store with a tape measure) do not insulate a retailer from liability if, the policies, practices, and procedures are – as in *Chapman* – ineffective;
- An obstruction is unlikely to be deemed temporary, if retailers place the onus upon the customer to request its removal;
- An obstruction will not necessarily be deemed temporary just because it was created by another patron and not the retailer itself – the retailer has an obligation to maintain its accessible routes;
- Even if individual instances of obstruction when viewed separately might be temporary, a volume of "temporary obstructions" can become sufficiently prevalent to constitute repeated and persistent failures that were not promptly remedied and, thus constitute a violation of Title III; and

Temporary Obstructions

GUIDANCE FROM THE *CHAPMAN* HOLDING

- True temporary obstructions – those that are isolated and transitory in nature – *e.g.*, maintenance equipment being actively used to make repairs or items currently involved in re-stocking merchandise – remain subject to Title III's exemption to the accessible route requirements.

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OSHA

Top Ten Most Cited Standards in Retail

Retail Group One

1. Hazard Communication
2. Powered Industrial Trucks
3. Wiring Methods, Components, and Equipment for General Use
4. General Electrical Requirements
5. Maintenance, Safeguards, and Operational Features for Exit Routes
6. Respiratory Protection
7. Portable Fire Extinguishers
8. Guarding Floor and Wall Openings and Holes
9. Personal Protective Equipment
10. Housekeeping

Top Ten Most Cited Standards in Retail

Retail Group Two

1. General Electrical Requirements
2. Wiring Methods, Components, and Equipment for General Use
3. Maintenance, Safeguards, and Operational Features for Exit Routes
4. Hazard Communication
5. Powered Industrial Trucks
6. Lead
7. Portable Fire Extinguishers
8. Design and Construction Requirements for Exit Routes
9. Housekeeping
10. Respiratory Protection

OSHA's General Duty Clause

- Section 5 of the Occupational Safety and Health Act provides that each employer

  > "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"

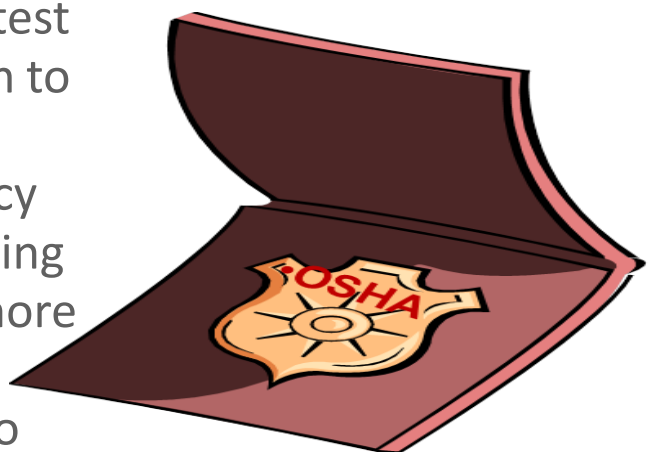
- Known as the "General Duty Clause," this part of the statute empowers OSHA to issue citations even in cases to which no specific OSHA standard applies.

- Notably, of the citations issued to retailers in both groups last year, General Duty Clause violations were ranked extremely high in frequency – nearly making it into the top ten most cited standards list for both groups.

The Wal-Mart Trampling Case

- Just a few weeks ago, on March 18th, OSHA won a key victory for its policy favoring expansive use of the General Duty Clause when Wal-Mart Stores, Inc. withdrew its longstanding legal challenge of an OSHA citation arising from the tragic trampling death of a store employee during a Black Friday sales event in 2008, and OSHA is publically lauding the move.

- This case has long been considered an important test case to OSHA's policy in the Obama administration to more forcefully employ use of the General Duty Clause to address potential hazards that the agency has yet to address through rulemaking. By accepting this citation, Wal-Mart has opened the doors to more aggressive OSHA inspections, complete with compliance officers who now have every reason to believe that anything they perceive to be a possible hazard can be successfully prosecuted under the General Duty Clause.



Workplace Violence

- Although OSHA is putting a great deal of resources into its workplace violence efforts in all industries, one of its prime targets is late-night retail establishments. The agency has published a 37 page guide to prevention strategies for workplace violence at these establishments on its website.
- Every employer should have a workplace violence policy in place and ensure that their employees understand it.
- Late-night retailers are at particular risk, however, if OSHA finds that such employers have failed to provide sufficient protections for their employees – the agency can easily point to its published guidance and issue a General Duty Clause citation for failing to adopt its suggestions. Late-night retailers in New Mexico and Washington state should also be aware that the OSHA approved State Plans in those states enforce workplace violence regulations specific to late-night retailers doing business in those states.

Temporary Employees

- On July 15, 2014, OSHA issued a policy memo to its field offices outlining when a compliance officer visiting a worksite should enlarge the inspection to include temporary agencies providing workers to the site.
- Generally, compliance officers were instructed that whenever a temporary worker was exposed to a violation, the compliance officer should determine whether the temporary agency was aware of the hazards or could have known about them.
- As a result, OSHA inspections involving temporary employee agencies increased 322% in fiscal 2014.
- Only 15% of the inspections resulted in citations being issued to temporary employee agencies.

Whistleblower Claims on the Rise

- New claims have dramatically increased in the vast majority of the 22 different whistleblower statutes that OSHA handles. Complaints of employer retaliation under the OSHA statute alone have risen 70% since 2005.
- But whistleblower investigators rarely find merit to those claims. Of the total number of claims determinations from 2005 to present, only 2% have been resolved on the merits. By comparison, during the same time period, 60% have been dismissed (others have been withdrawn, kicked out, or resolved in some type of settlement).
- Complaints are expected to continuously rise, nonetheless, as employees have become much more familiar with their rights under the various statutes containing whistleblower provisions. Particularly savvy complainants are filing complaints under multiple statutes simultaneously.

Injury and Illness Recordkeeping – Partially Exempt Retailers

Retailers Partially Exempt From OSHA's Recordkeeping Rule:

- RV and Other Recreational Vehicle Dealers
- Electronics and Appliance Stores
- Health and Personal Care Stores
- Gasoline Stations
- Clothing Stores
- Shoe Stores
- Jewelry, Luggage, and Leather Goods Stores
- Sporting Goods, Hobby, and Musical Instrument Stores
- Book, Periodical, and Music Stores
- Florists
- Office Supplies, Stationery, and Gift Stores

Injury and Illness Recordkeeping Requirements For All Other Retailers

- Unless your company is among the lucky few categories of retailers we just discussed, OSHA requires that you maintain work-related injury and illness logs.
- In the past, the forms have been hard copy documents.
- OSHA has announced, however, that in August of this year it will publish a new rule requiring the vast majority of employers that keep OSHA injury and illness logs to provide injury and illness information to OSHA electronically, on a frequent basis. This will enable OSHA to more quickly identify workplaces with high rates of injuries and illnesses and dispatch compliance officers to those locations to conduct inspections.
- Disturbingly, the electronically submitted injury and illness data will be "scrubbed of identifiers" and then placed on a publicly accessible database so the public will be able to review employers' injury and illness data.

Changes to OSHA's Injury and Illness Reporting Requirements

OSHA's updated reporting rule expands the list of severe injuries that employers must report to OSHA.

- As of January 1, 2015, **ALL** employers must report:
  - All work-related fatalities within 8 hours.
  - All work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours.
- You can report to OSHA by
  - Calling OSHA's free and confidential number at 1-800-321-OSHA (6742).
  - Calling your closest Area Office during normal business hours.
  - Using the new online form that will "soon" be available.

Regional Enforcement Issues for Retailers

- Federal OSHA is currently running a Local Emphasis Program targeting clothing stores, department stores, and other miscellaneous store retailers for enforcement in Hawaii, Guam, American Samoa, and Commonwealth of Northern Mariana Islands. Compliance officers have been instructed to pay particular attention to electrical hazards, forklifts, material handling hazards, and the design, construction and maintenance of exit routes.
- Although there is no official Local Emphasis Program for the area, high end boutiques have been targeted for enforcement in Las Vegas, Nevada. Compliance officers there have been focusing on the same group of potential hazards as those identified in the island enforcement program.

State Plan Requirements for Retailers

- You may already be aware that the California State Plan requires all employers to have an Injury and Illness Prevention Program. This is a comprehensive health and safety program that incorporates significant employee involvement and management commitment to creating a safe and healthy workplace.
- What you may not have heard about yet is a new requirement of the Minnesota State Plan called A Workplace Accident and Injury Reduction (AWAIR) program. The AWAIR program requirements are quite similar to those of California's Injury and Illness Prevention Program. Although not all employers are required to have such a program, virtually every type of retailer doing business in Minnesota must create a plan. Employers have until June 29, 2015 to comply.

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State and City Laws' Impact on Retailers' Policies and Procedures

Paid Sick Leave Laws – States and Cities

Current States and Cities with Paid Sick Leave Laws	
California	Irvington, NJ (effective January 1, 2015)
Connecticut	Passaic, NJ (effective January 2015)
Massachusetts	Paterson, NJ (effective January 2015)
San Francisco, CA	Trenton, NJ (effective March 2015)
Oakland, CA (effective March 2, 2015)	New York, NY
Washington, DC	Portland, OR
Jersey City, NJ	Eugene, OR
Newark, NJ	Philadelphia, PA (effective for all private employers May 2015)
East Orange, NJ	Seattle, WA
Montclair, NJ (effective March 4, 2015)	Tacoma, WA

"Ban The Box"

Eliminating the Criminal Conviction Question on the Application

- As of April 2015, 14 states and Washington, D.C. have embraced statewide ban the box legislation
- As of April 2015, nearly 100 cities or counties have banned the box

Employment Applications

- Criminal Convictions
  - Ban the box – should this inquiry even be included
  - Other state limitations and considerations
- Ability to Work in US (immigration queries)
- Employment-at-will Disclaimer (in light of NLRB)
- Social Security Numbers
- Cell/e-mail requested?
- Social media access/passwords
- Concerns regarding unemployment status (e.g., NYC, New Jersey, DC, Oregon)
- Other required information (e.g., MD, MA)

Onboarding Documents and Handbook Concerns

In light of State/City Laws

- State and City requirements to distribute notices at outset of employment
  - Types of notices
    - Wage Theft notices
    - Pregnancy accommodation notices
    - Paid sick leave notices
  - Acknowledgment of receipt
- Handbook/Policies
  - Sexual harassment - specific contact information for state FEPA
  - Vacation/Personal/Sick Day rules
  - Nursing mothers information
  - State family and medical leave laws
  - Domestic violence leave and other small necessities laws
  - Workplace violence ("Bring Your Gun to Work" laws)

Reasonable Accommodation

Pregnancy

- Several states and cities have passed pregnancy accommodation laws
  - Some apply when an applicant or employee is disabled due to pregnancy
  - Others apply solely because of an applicant or employee's pregnancy
- Examples of Accommodations
  - bathroom or rest breaks, and breaks for increased water intake,
  - assistance with manual labor,
  - job restructuring or modified work schedules,
  - reassignment to a vacant position,
  - temporary transfers to less strenuous or hazardous work,
  - leave
- Don't forget notice and posting requirements

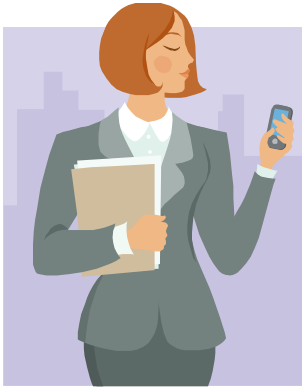
Employee Mobility & BYOD

We Are and Will Continue to Be a "Mobile Workforce"

- Today, **29 percent** of Internet-connected devices are PCs, while smartphones and tablets make up **66 percent**.
- Today, **one-third** of a company's mission critical apps are in the cloud (and growing fast)
- By 2016, **63 million people** in the United States (and growing) will work from home
- By 2020, **50 BILLION devices** (or six per person) will be connected to the Internet

Company Cell Phones

- For business purposes only (?)
- BYOD policies/acknowledgments
- Reimbursement for phone/service/data
- Prohibiting recording/picture taking (?)
- Texting/Talking while driving



“Bag Check” Concerns Still Alive in California

Notwithstanding US Supreme Court Decision

- Employee theft is a multi-billion-dollar problem
- Many retailers address the theft issue by requiring employees to undergo a screening – or “bag check” – when leaving the store to ensure they aren’t stealing anything
- Notwithstanding the US Supreme Court’s recent decision, retailers in California are still being hit with “bag check” class actions
  - Time employees spend in security screenings when leaving the stores – compensable under CA wage/hour law?

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NLRB's New Representation Election Rules

What The New Rules Mean For Retail

- New Rules were adopted by the Board, 3-2, on December 12, 2014 – to be effective April 14, 2015
- Faster elections
- Less time for employers to respond
- With Smaller Units (Specialty Health Care) and Joint Employer unions will be better able to selectively go after small groups

What The New Rules Mean For Retail

- These are most significant changes to NLRB election procedures to date
- The Board members who voted in favor said they are needed to “modernize” and “streamline” processes
- The changes are designed to make it easier for unions to win and harder for employers

What The New Rules Mean For Retail

- Speed – time frames are shortened – other steps eliminated or pushed back until after an election takes place
- Parties no longer able to litigate issues like unit scope or supervisory status in most cases prior to voting
- Parties no longer will have right to appeal of Regional Director decisions on election issues/questions before vote
- Employers need to raise/identify issues very early – if they do not they will have waived
- **More info to unions earlier (early list of names, shifts, locations, classifications)**
- **Information to unions that they have not been entitled to up until now – employees' email addresses and phone numbers**

What The New Rules Mean For Retail

- Key Differences in Process
  - Electronic Filing of the Petition - Unions can fax or efile petitions
  - Union must serve a copy of the petition on the employer at the same time
  - **Employer MUST post initial notice** informing employees that a petition has been filed within 48 hours – until now employers were "asked" but not required to post this notice
  - **Faster hearings within 8 days of the filing of the petition**
  - Hearing can be delayed up to 2 business days based on employer showing of "special circumstances" - Anything more than 2 days requires showing of "extraordinary circumstances."

What The New Rules Mean For Retail

- Employer's Must File Statement of Position Prior to Hearing
  - Must be filed by NOON the day before the hearing
  - **SOP needs to identify any issues that the employer**
  - **Identify issues re : Supervisory Status, Commerce/Jurisdiction of the NLRB over the Employer's business, labor organization status, eligibility period, seasonal issues, expanding or contracting unit, professional status, guard issues,**
  - **IF AN ISSUE IS NOT RAISED IN THE SOP IT IS WAIVED**
  - SOP must be served on the petitioner as well as to the Board
  - The NLRB is developing a form/format for the SOP

What The New Rules Mean For Retail

- Employers Must Provide NLRB and Petitioner with Employee List Prior to Hearing
  - The list goes to the NLRB and to the Petitioner Union
  - The list must include the name, job title, shift and work location of all employees in the petitioner for unit
  - If the employer contends that other employees, either at other locations or in other classifications should be included in the unit, the list must include their names and info as well
  - Until now there has not been a requirement to provide a list until after an election was agreed to or ordered (the Excelsior List)

What The New Rules Mean For Retail

- **Legal Challenges – Status**
  - Two lawsuits pending - brought by employers and industry groups
  - *Chamber of Commerce of the US v. NLRB* – in Washington – includes NRF, NAM
  - *Associated Builders and Contractors of Texas v. NLRB* – includes National Federation of Independent Businesses
- **Theories**
  - The Amended Rules violate Section 8(c), which is the Act's employer free speech provision
  - Claim that Rules Violate Section 9(b) by requiring employers to provide unions with employees home phone numbers, and email addresses
  - Rules Violate Section 9(c) by taking away employer hearing rights described in the Act

What The New Rules Mean For Retail

- The Rules are alleged to be Arbitrary and Capricious
- Rules are alleged to violate employers' First Amendment Speech Rights
- Rules are alleged to violate Fifth amendment by denying employers the right to litigate
- TIMING – In both cases, there have been motions for summary judgment by the plaintiffs and cross motions by the NLRB
- All will be fully briefed by 3/30/15
- Effective date of 4/14 – will courts rule by then?

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Specialty Healthcare Presents Unit Proliferation Dilemma

Specialty Healthcare = Micro Bargaining Units

- NLRB found unit of certified nursing assistants e appropriate.
  - Other non-professional service and maintenance employees left out.

- Board will certify *any* proposed unit it deems a "discrete group"
  - Even units covering a single job classification.
  - Board unapologetic in efforts to increase the number of NLRB conducted elections, to advance unionization and collective bargaining.
  - Helps unions collect authorization cards to obtain 30% support
  - Helps unions get their foot in the door.

- Employer's Burden: must show those left out share an "overwhelming community of interest" with the targeted group.

Macy's Extends *Specialty Healthcare* Beyond Healthcare Industry

- Community of interest in unit of cosmetics and fragrance sales employees.
  - "readily identifiable group" as a "primary selling department"

- Community of interest based upon:
  1. Work in the same department;
  2. Directly supervised by the same manager;
  3. Sell cosmetics and/or fragrances (functional integration);
  4. Limited contact with other selling employees;
  5. Same commission-based pay structure and benefits; and
  6. Limited transfer of employees between the fragrance/cosmetics and other store departments.

Take Aways from the Boards Micro-Unit Cases

- "Community of interest" Standard applicable in (nearly) every industry.
- NLRB will not find proposed unit inappropriate just because:
  - They work on different floors,
  - Wear different uniforms,
  - Earn commissions at different rates,
  - Sell different products.
- Board *may* give deference to employer-established lines of demarcation.
- Board's decisions heavily fact dependent.
- Well-developed record is critical.
- New election procedures prevent employers from challenging matters before the election.
- Employers must be prepared.

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NLRB's Definition of Joint Employers

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The Board is reviewing the relationship between Franchisor and Franchisee in *McDonald's* and between employers and contractors in *Browning-Ferris*.
- On December 19, 2014, the General Counsel issued Consolidated Complaints in Regional Offices nationwide charging that McDonald's and franchisees are joint employers and seeking to hold McDonald's liable for unfair labor practices allegedly committed by its franchisees. Hearings began in New York on March 30, 2015.
- "Our investigation found that McDonald's, USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act. This finding is further supported by McDonald's, USA, LLC's nationwide response to franchise employee activities while participating in fast food worker protests to improve their wages and working conditions."

www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- In *Browning-Ferris* the Board is considering whether to amend its current joint-employer standard. The General Counsel, as well as the SEIU and other interested parties, have filed Amicus Briefs urging the Board to abandon its existing joint-employer standard under which an entity can be a joint employer if it exercises direct or indirect control over working conditions in favor of a much broader standard.
- The current joint-employer standard set out 30 years ago by the Board in *Laerco Transp*. recognizes that two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment. This test follows with the Supreme Court's joint-employer test set out in *Boire v. Greyhound Corp* (1964) (joint-employer status turns on whether the entities "exercised common control over the employees")

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The Union, the General Counsel and interested third-parties such as the SEIU are urging the Board to adopt a new much more expansive joint-employer standard which would require bargaining with any company that, as a practical matter, determines the terms and conditions of employment.
- The General Counsel filed an Amicus Brief urging the Board to abandon its existing joint-employer standard stating that "[t]he current standard also ignores Congress's intent that the term "employer" be broadly construed in light of economic realities and the Act's underlying goals, and has particularly inhibited meaningful bargaining with respect to contingent workforce and other nontraditional employment arrangements."
- This newly expanded standard would result in a joint-employer finding where a putative employer negotiates the economic terms of a subcontract to include exercising "indirect control" over the contractor's employees by setting the price it is willing to pay and the efficiencies in the services it requires.

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The SEIU's Amicus Brief reveals the potential reach of the Board's decision in healthcare, property services and food service companies.
- *Healthcare Sector* – "The practical reality, though, is that complexity and risk involved in providing quality health care provides a powerful incentive for health organizations to retain significant control over their outsourced employees' terms and conditions of employment in order to ensure quality patient care, uniformity of treatment and protection of their healthcare "brands."" SEIU examples of outsourced functions include laundry, housekeeping and food services, health information technology, call-centers, human resources, patient care services, emergency room management, equipment maintenance, cardiovascular perfusion, diabetes treatment, benefits, skilled nursing, physical and occupational therapists, home health aides and administrative processes and management of non-clinical services.

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- *Property Services.* SEIU represents over 200,00 workers in property services including cleaners and security officers. "Contractors in these industries compete for business largely on the basis of price, and labor costs are often the most significant component of that price. …contract relationships are typically fixed-price agreements for relatively short time periods that are subject to termination upon thirty days' notice…no meaningful change [in wages] can be negotiated without the approval of the company that controls the purse strings. That is why in the janitorial and security industries, building owners have the real power…" SEIU Brief
- Property owners also control the start and end times for workers, holidays, approve the hire and removal of workers, qualifications and working conditions.

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Advice for Employers: Analyzing Work Forces & Vulnerabilities

Advice to Employers

- Prepare now
- Ensure you have a lawful no-solicitation policy and it is uniformly applied
- Conduct review of handbook to ensure policies are lawful
  - Unions often challenge handbook policies on their face to stir up support
- Continually campaign
  - Conduct regular trainings
  - Regularly releases messages to employees
- Train managers on avoiding unionization
  - This is especially important in light of rise of micro units – even one bad manager can result in the unionization of a department
  - Training should also include process for reporting union activity and how to lawfully respond to union activity

Advice to Employers

- Know your workforce
  - Implement & follow an open door policy
  - Consider having town halls or other methods for employees to share their concerns with management
- Assess your areas of risk and vulnerability
  - Identify unhappy employee groups
  - Identify groups that could be underpaid
- Prepare in advance for unit determinations
  - Conduct audits of workforce

Warning Signs of Union Activity

- Strangers or former employees hanging around workplace
- Emails about employee-only meetings
- New leaders or vocal speakers emerge
- Heated discussions amongst employees
- Rumor mill especially active
- Observe employees passing out flyers
- Employees take breaks or lunch outside of usual break areas
- Employees stop speaking freely
- Employees challenge managers more frequently
- Employees begin using union terminology like “grievance,” “for cause,” “seniority”
- Union activity at nearby facility
- Employees wearing unions hats, buttons, shirts

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Work Rules, Policies and Employees' Section 7 Rights

The NLRB on Handbooks and Rules

- The National Labor Relations Board Has Placed Great Emphasis on Handbooks, Work Rules and Policies at Union and Non-Union Employers Obama Board Has Been Rules
- The Board and General Counsel Focus on whether rules and policies interfere with employees' Section 7 Rights Under the National Labor Relations Act
- Section 7 protects employees' rights to engage in "protected concerted activities" with respect to their "terms and conditions of employment"
- The Obama Board's expansive view of "protected concerted activities"

The NLRB on Handbooks and Rules

- On March 18, 2015, the Board's General Counsel issued Memorandum GC 15-04 - extensive guidance as to the General Counsel's views concerning polices and rules, in handbooks and otherwise
- This GC Memo is highly relevant to all employers in all industries that are under the jurisdiction of the National Labor Relations Board, regardless of whether they have union represented employees
- The memo is meaningful to all employers and offers important guidance as to what language and policies are likely to be found to interfere with employees' rights under the Act, and what type of language the NLRB will find does not interfere and may be lawfully maintained, so long as it is consistently and non-discriminatorily applied and enforced

The NLRB on Handbooks and Rules

- The Board's legal standard for deciding whether an employer policy unlawfully interferes with employees' rights under the Act is **generally whether "employees would reasonably construe the rules to prohibit Section 7 activity"**
- That is action of a concerted nature intended to address issues with respect to employees' terms and conditions of employment
- This General Counsel and Board consistently give these terms broad interpretations and have found many employer policies and procedures, in handbooks and elsewhere, that appear neutral and appropriate on their face, to violate the Act and interfere with employee rights
- Many of these cases have involved non-union workplaces where there is not a union present and there is no union activity in progress

Confidentiality

- Employer handbook rules regarding confidentiality: **"Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as nonemployees such as union representatives"**
- However, "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information"
- "An otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity"

Employee Conduct Toward Supervisors

- **"Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees"**
- The Memorandum offers an overview of decisional law, with particular attention to cases involving rules that prohibit employees "from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context."
- Employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory"

Conduct Toward Fellow Employees

- Employees have the right "to argue and debate with each other about unions, management, and their terms and conditions of employment"
- Such conduct will not lose their protection under the Act, **"even if it includes 'intemperate, abusive and inaccurate statements**"
- Harassment Policies: **"although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects"**

Policies Concerning Interaction With Media And Other Third Parties

- Provisions that seek to regulate and restrict employee contact with and communications to the media relating to their employment may be unlawful
- The General Counsel notes that **"(A)nother right employees have under Section 7 is the right to communicate with the new media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment"**
- Rules **"that reasonably would be read to restrict such communications are unlawful"**
- **"Employers may lawfully control who makes official statements for the company," and that any such rules must be drafted so as "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees'") behalf**

Employee Use of Company Logos and Trademarks

- Employer policies, whether contained in employee handbooks or elsewhere, that broadly prohibit employees from using logos, copyrights and trademarks may unlawfully interfere with employees' Section 7 rights
- While the General Counsel acknowledges that "copyright holders have a clear interest in protecting their intellectual property," the Board has found, with the approval of such courts as the Fourth Circuit Court of Appeals, that "handbook rules cannot prohibit employees' fair protected use of that property"
- It is the General Counsel's position that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "employers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity"

Employee Photography and Recording in the Workplace

- Many handbooks and policies prohibit or seek to restrict employees from taking photographs or making recordings in the workplace and on employer policy
- The Memorandum points out that **"employees have Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures make recordings"**
- The Memorandum further notes that such policies will be found to be overbroad **"where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time"**

Leaving Work

- The Memorandum notes that **"one of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike"**
- Therefore **"rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts"**
- Not all rules concerning absences and leaving the workstations are unlawful. A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity"

Conflict of Interest Rules

- Under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests
- Examples of such activities that could arguably be in violation of broad conflict of interest policies as protests outside the employer's business, organizing a boycott of the employer's products and services and solicitation of support for a union while on non-work time
- The Memorandum notes that when a conflict of interest policy "includes examples of otherwise clarifies that it limited to legitimate business interests (note: as that term is defined by the General Counsel and the Board) employees will reasonably understand the rule to prohibit only unprotected activity"

Labor Management Relations Briefing

New Union Rules and Rulings:

Proactive Strategies for Employers Facing Today's Aggressive National Labor Relations Board and New Expedited Representation Elections

Tuesday, April 14, 2015

Hilton Westchester • 699 Westchester Avenue • Rye Brook, NY 10563

Contact Elizabeth Gannon to receive a complimentary registration

egannon@ebglaw.com or 202/861-1850

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ACT NOW ADVISORY

Massachusetts Now Requires Employers to Provide Domestic Violence Leave

September 18, 2014

By Barry A. Guryan and Kate B. Rhodes

Massachusetts has enacted a law requiring employers with 50 or m grant employees "domestic violence leave." The law, entitled "An [D]omestic [V]iolence," was approved by Governor Deval Patrick or and took effect immediately.

Under this new law, employers with 50 or more employees must p with up to 15 days of paid or unpaid leave in any 12-month period if:

- the employee, or a family member of the employee, is a behavior";
- the employee is not the perpetrator of the abusive beh employee's abused family member; and
- the employee is using the leave from work to do any of the follo
  - seek or obtain medical attention, counseling, victim assistance;

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LABOR AND EMPLOYMENT

The July 2014 issue of *Take 5*, "Five Labor and Employment Issues Faced by Health Care Employers," was written by **Michael F. McGahan,** a Member of the Firm, and Associates **D. Martin Stanberry** and **Daniel J. Green.**

Michael F. McGahan
Member of the Firm
New York
mmcgahan@ebglaw.com
212-351-3768

D. Martin Stanberry
Associate
New York
mstanberry@ebglaw.com
212-351-4579

Daniel J. Green
Associate
New York
djgreen@ebglaw.com
212-351-3752

As the Affordable Care Act and the challenges of reimbursement and funding for health care services drive changes in the health care delivery system and employment in the industry, new issues in labor and employment law are arising. This month's *Take 5* addresses five of these new and important issues as they impact employers in the health care industry.

1. **NLRB's Proposed Changes to Its Union Election Rules and Approval of Micro-Bargaining Units Increase Health Care Facilities' Risk of Union**

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CLIENT ALERT

September 2014 Immigration Alert

Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

USCIS Expands H-1B Eligibility for Nurses

Obama Administration Warns ACA Sign-Ups to Provide Proof of Legal Status

nia Supreme Court Expands Rights of Immigrants Working in that State

sues Technical Assistance Regarding Employer's Receipt of Excess entation During the Form I-9 Process

ettles Immigration-Related Discrimination Claims Against Staffing Agency

do Employers Must Use New Affirmation Form Starting October 1, 2014

Valley Man Receives 10-Month Sentence for H-1B Fraud

sues October 2014 Visa Bulletin

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Circuit Expands the Liability of Health Care Employers for Sponsorship

st 20, 2014, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Kutty v. U.S. ent of Labor*, No. 11-6120 (6th Cir. 2014) ("*Kutty*"). In *Kutty*, several foreign physicians sued the

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Q&A

Valerie Butera
vbutera@ebglaw.com
(202) 861-5325

Susan Gross Sholinsky
sgross@ebglaw.com
(212) 351-4789

Joshua A. Stein
jstein@ebglaw.com
(212) 351-4660

Steven M. Swirsky
sswirsky@ebglaw.com
(212) 351-4640