The New Employment Nightmares: What is Keeping You Up at Night?

Some might argue that employment laws change as quickly as the weather. That probably isn't the case, but it is undeniable that workplace laws are constantly evolving and that HR often is on the leading edge of new developments . . . often in good ways, but not always. Volumes could be (and have been) written on just some of the basic employment law topics, and there is no way that a brief overview presentation can begin to even scratch the surface. There are a handful of issues, however, that just aren't going away anytime soon: wage and hour compliance, interns, pre-employment background checks, social media, and the National Labor Relations Board's growing involvement in critical aspects of virtually all workplaces. Some of these issues truly are unprecedented and bring unique challenges for employers. Others are reminiscent of the adage "everything old is new again."

I. Wage and Hour Compliance

A. Minimum Wage and Overtime Exemptions

The Fair Labor Standards Act ("FLSA") requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department of Labor's regulations.

i. Executive Exemption

To qualify for the **executive employee** exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

ii. Administrative Exemption

To qualify for the **administrative employee** exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

iii. Professional Exemptions

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

iv. Computer Employee Exemption

To qualify for the **computer employee** exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week **or**, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

v. Outside Sales Exemption

To qualify for the **outside sales** employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in

production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

B. Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are

employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S. Ct. 1473, 1477 (1947).

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA (*i.e.*, whether a worker is an employee, as opposed to an independent contractor):

1) The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3) The relative investments in facilities and equipment by the worker *and* the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4) The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor

status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5) The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6) The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

Requirements Under the FLSA

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least

the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements. Also, be sure to check state law for any additional wage and hour regulations that may apply in addition to the FLSA.

II. Interns

A. Background

The use of interns in the workplace is a particularly thorny FLSA issue and has recently spawned litigation across the country. *See, e.g.*, *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. Appx. 831, 835 (11th Cir.) (unpublished) (holding students in medical billing and coding program who worked at unpaid internships to meet graduation requirements were not employees under FLSA but were instead interns), *cert. denied*, ___ U.S. ___, 134 S. Ct. 618 (2013); *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013) (concluding that unpaid interns who worked on set of *Black Swan* were improperly classified and should have been treated as employees under FLSA), *reconsideration granted in part and denied in part*, No. 11-CV-6784, 2013 WL 4834428 (S.D.N.Y. 2013); *Wang v. Hearst Corp.*, 293 F.R.D. 489, 494 (S.D.N.Y. 2013) (holding genuine issues of material fact existed as to whether unpaid interns at magazine should have been classified as employees under FLSA, and denying class certification).

The FLSA defines the term "employ" very broadly as including to "suffer or permit to work." Covered and non-exempt individuals who are "suffered or permitted" to work must be compensated under the law for the services they perform for an employer. Internships in the "for-profit" private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the "for-profit" private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.

B. The Test for Unpaid Interns

There are some circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. The Supreme Court has held that the term "suffer or permit to work" cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad. Some of the most commonly discussed factors for "for-profit" private sector internship programs are considered below.

C. Similar to an Education Environment and the Primary Beneficiary of the Activity

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will

not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

D. Displacement and Supervision Issues

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a work week. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled to compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

E. Job Entitlement

The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

III. Pre-Employment Background Checks

The economic woes of the past several years have made it harder than ever to get a job. One by-product of the shrinking job market is that many employers have found themselves deluged with applications for most positions they need to fill. So how do they sift through all those applications? In many cases, they turn to the time-honored process of conducting pre-employment background checks.

Background checks certainly are nothing new. In fact, according to a 2010 survey by the Society for Human Resource Management, about 73% of large employers say they always check on applicant's criminal records, and another 19% do so for select job candidates. Increasingly, however, federal scrutiny of background checks has led some companies to reconsider their longstanding practices.

For example, the U. S. Equal Employment Opportunity Commission (EEOC) has launched what it calls its E-RACE (Eradicating Racism and Colorism in Employment) initiative. Through E-RACE, the agency looks for criteria that

contribute to certain types of unlawful discrimination. High on the EEOC's list of suspect policies are those that rely on criminal history, credit reports, and social media to screen applicants.

A. Criminal History

Earlier this year the EEOC announced that an internationally-known beverage manufacturer had agreed to pay $3.13 million to settle federal race discrimination allegations. What was the company's alleged sin? It rejected applicants who had arrest records. According to the EEOC, the company's policy disproportionately excluded more than 300 black applicants, including some who had never actually been convicted of the crimes for which they were arrested.

The EEOC's position, which does not carry the force of law but often is used as guidance by judges, is that using arrest and conviction records to deny employment can be illegal if it is irrelevant for the job. The agency says such blanket policies can limit job opportunities for minorities, particularly blacks and Hispanics, who typically have higher arrest and conviction rates than whites. Thus, a blanket policy against hiring someone who has been arrested, or even who has a criminal record, will trigger extra scrutiny by the government.

A better approach for most employers is to evaluate candidates and their criminal histories on a case-by-case basis. What position is the person seeking? Is it the type of position that requires someone with an unblemished criminal history? How serious were the criminal charges and how long ago did they occur? Asking questions like these and weighing the answers against the particular duties and responsibilities of the job in question can go a long way toward successfully defending against any challenge to the background check process.

If an employer must ask about an applicant's criminal history, it is best if the inquiry is limited to offenses that arguably relate to the position at issue. Also, the value of giving the applicant an opportunity to explain or dispute any negative information cannot be overstated. There are virtually no employment laws that actually contain the word "fair," but the first thing that any government agency, judge, or jury wants to know is whether the employer acted fairly. There is no downside to allowing an applicant to give their side of the story. (The same holds true for letting an employee accused of wrongdoing explain whatever they want to explain, but that is a topic for another day.)

B. Credit Reports

The EEOC also takes a close look at the use of credit reports as a tool for weeding out undesirable applicants. With unemployment numbers still at record highs, one of the goals of the entire federal government, not just the EEOC, is to eliminate as many obstacles to employment as possible.

Perhaps not surprisingly, the EEOC takes the same dim view of credit reports as a screening tool as it does of criminal histories. Just as certain minorities are statistically more likely to be arrested and/or convicted than the population as a whole, using credit reports arguably affects some protected classes more than others.

That is not to say that credit reports have no legitimate role in the hiring process, however. They could provide useful information when an employer is looking to fill a position that involves financial transactions or requires the handling of cash. Businesses must be careful, however, not to consider certain information that they may find in a credit report. For example, credit reports would likely indicate whether the individual had filed for bankruptcy, and some might reveal information about medical or health conditions. If an employer used any of that information as a basis for not hiring the individual, it would be unlawful.

Some states have simply banned employers from using credit reports as a screening tool. Even in those states where it is permitted, however, the employer must ensure that it complies with all of the requirements of the Fair Credit Reporting Act before using credit report information against an applicant. (See below.)

C. Social Media Background Checks

Whoever said "What happens in Vegas stays on Facebook" hit the nail right on the head. There is a wealth of information out there just waiting to be tapped, and much of it, were it ever to come to light, would probably keep some people from getting a job . . . ever. Thus, it should come as no surprise that the first thing some businesses do is scour the Internet, including Facebook, MySpace, YouTube, Twitter, and other social media sites for anything they can find about applicants.

There is nothing inherently unlawful, or even wrong, about researching people on the Internet. Sites such as LinkedIn even encourage their subscribers to post information that a prospective employer would find useful. The problem, however, is that too much information may be available on social media sites. For example, if an employer were to look at an applicant's Facebook or LinkedIn page, the person's race, gender, and age might be readily apparent. Unfortunately, that information cannot lawfully be considered in the hiring process. Likewise, that birthday party video they posted to YouTube might show that they are confined to a wheelchair or that their mother suffers from some noticeable medical condition that would not have been known to the employer but for the search of social media sites. At that point, it may be small consolation that the applicant ultimately was rejected because he was less qualified than another candidate. The employer has exposed itself to a potential claim of discrimination

simply by coming into possession of protected information through a completely lawful Internet search.

To minimize the risk of a discrimination claim based on "knowing too much," the employer should establish a policy whereby social media background checks are conducted by someone who is otherwise completely removed from the application and selection process. Once the decision maker has narrowed the field through traditional methods, the person who conducted the Internet search of social media sites can offer any information that should be considered in the final analysis. That person should be trained *not* to reveal any protected characteristics or other information that cannot lawfully be considered by the decision maker.

D. Fair Credit Reporting Act

One aspect of background checking that still causes headaches for many employers is the role of the Fair Credit Reporting Act (FCRA). As strange as it may seem, the same statute that governs the relationship between lenders and applicants for credit also comes into play when an employer uses information provided by a third party to take adverse employment action against an applicant or employee. Adverse employment action can include things such as decisions not to hire, decisions to terminate, decisions to demote, and more.

The FCRA applies to background checks, credit reports, and possibly even to Internet searches conducted by someone other than the employer itself. (There is even some legal basis for the notion that the FCRA is triggered when information uncovered by a manager who uses his/her smartphone to run a background check on an individual – yes, there are apps for that – then uses that information as the basis for an adverse employment action.) The problem for many employers is that, when a third party conducts the background check, the FCRA requires that a specific disclosure form must be provided to and signed by the applicant/employee. The disclosure must be a standalone document with very particular wording, however, and cannot be combined into any other document, such as a waiver. Also, express authorization to conduct a third-party background check must be obtained from the individual, a pre-adverse action notice must be given before any adverse action is taken based on the third-party report, and an adverse action notice must then be provided after taking any adverse action based, in whole or in part, on the information contained in the third-party report.

Predictably, many employers fail to properly jump through all of the required hoops. Too often, the result is litigation by one or more disgruntled individuals. In recent years, there also has been an alarming increase in the number of class action lawsuits filed based on FCRA violations. Some of these lawsuits have resulted in multi-million dollar settlements, along with huge legal fees and costs. Thus, there are significant incentives for employers to become familiar with FCRA's requirements and to develop policies and procedures that follow the letter of the law.

IV. The National Labor Relations Board

The National Labor Relations Board ("Board" or "NLRB") is an independent federal agency whose job is to oversee the interactions between unions and management, to protect the rights of employees to decide whether they want to be or don't want to be represented by unions, and to investigate and remedy unfair labor practices committed by unions and employers. While it is the official policy of the United States to encourage collective bargaining (i.e., unionization), Section 7 of the National Labor Relations Act ("Act"), which is the primary statute giving rise to virtually all of the NLRB's activities, gives employees the right to support or oppose unions, as they may choose.

The Board has jurisdiction over private sector employers whose activity in interstate commerce exceeds a threshold financial level. As a practical matter, the Board's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws. There are some employers that are excluded from the NLRB's jurisdiction, however. They include:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations;
- Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery; and
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.

Many employers and employees are surprised to learn that employees covered by the Act have certain rights to join together to improve their wages and working conditions, even though they may not have a union. Covered employees have the right to attempt to form a union where none currently exists, or to decertify a union that has lost the support of employees. Examples of employee rights involving unions include:

- Forming, or attempting to form, a union;
- Joining a union, whether or not the union is recognized by the employer;
- Assisting a union in organizing efforts;
- To be represented by a union; and/or
- Refusing to do any or all of these things.

Employees who are not represented by a union have protected rights, too. Specifically, the Act gives employees the right to engage in "concerted activity,"

which simply means that two or more employees are taking action for their mutual aid or protection regarding terms and conditions of employment. A single employee also can engage in protected concerted activity if he or she is acting on behalf of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action. Concerted activities can include such things as:

- Two or more employees meeting with the employer to talk about improving wages;
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other; and/or
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Current Developments at the NLRB

In recent years, the NLRB has undertaken a seeming reinvention of itself. Perhaps in an effort to make itself more relevant in an era when unionization is at an all-time low, the Board has injected itself into several aspects of workplace life that historically have not been within its bailiwick.

Apart from its crusade on behalf of employee social media rights, which is discussed in detail in the next section, the Board has also struck down a variety of employee handbook provisions within the past year. Provisions deemed unlawful by the NLRB include "at-will" disclaimers, mandatory arbitration provisions, requirements to keep internal investigations confidential, and provisions that require employees to act respectfully toward others in the workplace. *See, e.g., First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO*, No. 28-CA-023017 (April 2, 2014); *Am. Red Cross Blood Arizona Blood Servs. Region*, No. 28-CA-023443 (Feb. 1, 2012); *D.R. Horton, Inc.*, No. 12-CA-25674 (Jan. 3, 2012), *enforcement granted in part, rev'd in part*, 737 F.3d 344 (5th Cir. 2013).

More recently, one of the Board's regional directors ruled that college athletes are "employees" who are entitled to unionize and negotiate with their schools over wages, hours, and other terms and conditions of employment. *See Northwestern Univ.*, No. 13-RC-121359 (March 26, 2013). And the NLRB's Office of General Counsel has filed a brief taking the position that employees have a protected right to use their employer's internal e-mail system for union organizing. *See Purple Communications, Inc.*, Nos. 21-CA-095151; 21-RC-091531, 21-RC-091584.

Although one would expect that employees who shout obscenities at their employers and call them names such as "f***king crook," "a**hole," and "stupid" could lawfully be fired without a second thought, one would be wrong. A pair of recent Board decisions ruled that such conduct may be protected if it

does not include threats or physical harm to anyone. In one of those cases, the Board even went so far as to suggest that the owner of the business may have "provoked" the misconduct by saying that the employee could quit if he didn't like working there. *See Plaza Auto Center, Inc.*, No. 28-CA-22256 (Aug. 16, 2010); *Hoot Winc, LLC*, No. 31-CA-104872 (May 19, 2014).

Finally, a very recent decision could open the door to new sources of liability from some employers. The decision allows franchisors to be treated as "joint employers" along with their franchisees. NLRB General Counsel Richard Griffin issued a ruling that McDonald's Corp., as a nationwide franchisor, could be jointly liable for unfair labor practices committed by independent franchisees that own and operate McDonald's restaurants, and he authorized the issuance of at least 43 complaints against McDonald's as a joint employer of the franchisees' employees.

Presently, the overwhelming majority of courts that have examined the issue of whether franchisors are joint employers have done so in the context of other federal anti-discrimination statutes, such as Title VII, and have rejected joint employer status for franchisors such as McDonald's. The NLRB General Counsel's decision represents yet another effort by the Board to make it easier for unions to organize workers. Industries that are heavily franchise-based, such as food service and hospitality, will no doubt be watching these developments closely, as a shift in the law could have a significant impact on the entire franchise business model.

V. Social Media Issues

The increasing impact of instant access to social media is undeniable. Understandably, employers have struggled with whether to regulate employees' use of social media to discuss workplace issues and, if so, how. Until recently, employers (and their attorneys) simply did their best, having little guidance on the issue. That, however, is changing.

What is probably surprising to most businesses is that the biggest legal "player" in the world of workplace social media issues is the NLRB. Most people think of the NLRB only as the regulator of union-management relationships but, perhaps in an effort to make itself more relevant in an increasingly non-union world, the agency has injected itself into the land of Facebook and Twitter.

In January, the NLRB's General Counsel released a report summarizing the agency's cases that involve employee participation in social media. (http://bit.ly/x0iKW8) The report comes on the heels of a similar one released in August 2011 (http://bit.ly/opwRal) and makes it clear that the NLRB sees the world of social media as an extension of the workplace. It emphasizes that employers are not free to adopt social media policies that might discourage or interfere with certain types of online – even off-duty – activity, and that the

NLRB intends to ensure that employees can engage in protected, concerted activities online without fear of adverse consequences from their employers.

A. Policies Struck Down as Unlawful

- **A Internet/blogging policy prohibiting employees from making disparaging remarks when discussing the company or supervisors and from depicting the company in any media without company permission.**

The NLRB found that this policy could be construed by employees as prohibiting them from engaging in protected activity, such as posting a picture of employees carrying a picket sign depicting the company's name or wearing a t-shirt portraying the company's logo in connection with a protest involving terms and conditions of employment.

- **An Internet/blogging policy stating that when engaging in internet blogging, chat room discussions, e-mail, text messages, or other forms of communication in a manner that reveals confidential and proprietary information about the employer or engaging in inappropriate discussions about the company, management, and/or coworkers, the employee may be violating the law and could be subject to disciplinary action, up to and including termination.**

Here, the NLRB suggested that the rule might "chill" employees in the exercise of their rights. The utilization of broad language regarding "inappropriate discussions" without providing a definition or specific examples led the agency to conclude that this policy might reasonably be interpreted by employees to prohibit their protected discussion of terms and conditions of employment among themselves or with third parties.

- **A hospital's social media, blogging, and social networking policy that prohibited employees from using any social media that might violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity. The policy further prohibited any communication or post that constituted embarrassment, harassment, or defamation of the hospital or any hospital employee, officer, board member, representative or staff member.**

The NLRB decided that, without any definitions or guidance as to what the hospital considered to be private or confidential, this policy was overly broad. Also, absent any limitations, the policy could be reasonably interpreted as

prohibiting protected activity, including employee discussion of wages and other terms and conditions of employment.

- **A provision in an employee handbook prohibited employees, on their own time, from using micro-blogging features to talk about company business on their personal accounts; from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy; from disclosing inappropriate or sensitive information about the employer; and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate. The policy included language that intimated that violations of this policy could result in termination.**

The NLRB found that the prohibitions were broad terms that would commonly apply to protected discussion about, or criticism of, the employer's labor policies or treatment of its employees. This policy did not provide any definitions or guidance as to what communications could cost an employee his or her job and, again, was overly broad due to this lack of specificity. The policy was further deemed unlawful because it prohibited employees from using the company's name, address, or other information on their personal profiles. As this ban was not narrowly drawn to address whatever concerns the employer had about the employees' disclosure of their association with the employer, it could be construed as having the unlawful purpose of attempting to prevent employees from finding and communicating with their coworkers about wages, hours, and other terms and conditions of employment.

- **An employer's communications policy prohibited employees from disclosing or communicating information of a confidential or sensitive nature, or non-public information concerning the company, on or through company property to anyone outside the company without prior approval of senior management or the law department. In another provision of the policy, the employer required that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer or its affiliates.**

Here, the NLRB ruled that the policy, which prohibits employee communications to the media or requires prior authorization for such communications, is unlawfully overbroad in light of the fact that employees have a right to communicate to the public about an ongoing labor dispute. As for the portions of the policy specifically targeted to social networking, the NLRB found that these provisions ran afoul of employees' right to engage in concerted action for mutual aid or protection. The language of the policy also was found to violate

employees' rights to discuss working conditions and to criticize the employer's labor policies.

B. Policies Upheld as Lawful

- **A social media policy that prohibits the use of social media to post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace polices against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, statutes or characteristic.**

Often, a rule or policy's context provides the key to determining whether it is lawful. Here, the prohibitions set forth in the policy are simply inconsistent with any protected activity in which employees might engage. By carefully drafting the policy to apply only to conduct that is plainly egregious or unlawful, the company ensured that the policy did not lend itself to any interpretations that would limit employees' protected rights.

- **A social media policy that required employees confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. This policy included language that prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and also prohibited employees from discussing in any form of social media "embargoed information" such as launch and release dates and pending reorganizations.**

The NLRB found that employees would be expected to reasonably interpret this rule to address only those communications that could implicate security regulations and/or the disclosure of confidential/proprietary information. The agency focused on the policy's specific use of examples as being instrumental in prohibiting an overly broad interpretation. It also was noted that, as employees have no protected right to disclose embargoes on corporate information, this policy could not reasonably be interpreted to prohibit protected communications about employees' working conditions.

- **A social media policy that was narrowly drawn to restrict harassing conduct and stated that no employee should ever be pressured to "friend" or otherwise connect with a coworker via social media.**

Here, the NLRB found that the rule was sufficiently specific in its prohibition against pressuring coworkers and was clear in its application only to harassing conduct. As written, it could not be reasonably construed to restrict employees from attempting to "friend" or otherwise contact colleagues for the purposes of engaging in protected, concerted or union activity.

From just these few examples, it is evident that the NLRB is trying to drive home the point that if employees have the right to discuss a topic around the water cooler, they have the right to do so over the Internet. One obvious pattern in the cases is that the more specific a policy is, the more likely it is that the NLRB will find it to be lawful.

Just as in any other context, employers have the right to prohibit employees from engaging in communications that are obscene, vulgar, harassing, or illegal. Those same prohibitions clearly pass muster in the social media context. When, however, an employer implements a policy seeking to prohibit a broad range of communications simply because they may not be deemed to be in good taste or in the best interests of the company, such a policy will almost certainly be found unlawful.