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General labour market trends and latest/likely trends in employment litigation

Policies restricting the use of social media by employees

The United States National Labor Relations Board ("NLRB") has recently taken great interest in employer policies that restrict an employee's use of social media. Specifically, the NLRB has focused on policies which it believes violate an employee's right to "engage in . . . concerted activities . . . for the purpose of . . . mutual aid or protection" as protected by Section 7 of the National Labor Relations Act ("NLRA").

In May 2012, the NLRB issued a memorandum discussing recent cases in which it found that employers' social media policies had violated their employees' rights under Section 7. *See Memorandum OM 12-59,* available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd (the "May 2012 Memorandum"). It is the NLRB's position that policies that restrict an employee's use of social media, such as Facebook or Twitter, would violate the NLRA if the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights". According to the NLRB's Memorandum, an employer's social media policy may be unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

A recent example of the NLRB's enforcement of its position is its decision in *Design Technology Group, LLC,* 359 NLRB No.96 (April 19, 2013). In this case, the NLRB found that the termination of employees who posted complaints on Facebook about having to work late in an unsafe neighborhood was an unlawful interference with their rights to engage in concerted activities protected by Section 7. The NLRB found that the employees' Facebook postings were "complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management's refusal to address the employees' concerns about the conduct of their employers and supervisors on Facebook", and as such constituted "protected concerted activity under Section 7." *Id.* at *1.

Employers seeking to craft social media policies compliant with the NLRA should consider the following guidelines:

- Avoid policies containing ambiguous rules "as to their application to Section 7 activity". *See Memorandum OM 12-59* at 20.
- Ensure that all policies provide specific rules that contain "limiting language or context to clarify that the rules do not restrict Section 7 rights". *Id.*
- Provide clear rules with "examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity". *Id.* This will help to clarify and restrict the scope of the employer's policies.

Employers should be mindful of the NLRB's May 2012 Memorandum when constructing social media policies. Furthermore, in light of the NLRB decision in *Design Technology Group,* employers should be mindful of these guidelines and receive advice from counsel before making the decision to terminate or discipline an employee based on his or her violation of a social media policy.

Rights of interns

(a) Payment of wages

A recent court decision, followed by a number of high-profile lawsuits, has brought to light the issue of whether and how companies may use unpaid interns. In June 2013, a New York federal court found that unpaid "interns" used by Fox Searchlight Pictures on the film *Black Swan* should have been classified as employees subject to the minimum wage requirements of the both the United States Fair Labor Standards Act ("FLSA") and New York labour law. In *Glatt v. Fox Searchlight Pictures Inc.,*11-Civ-6784 (WHP), 2013 WL 2495140 (S.D.N.Y. June 11, 2013), the Court examined six factors established by the United States Department of Labor to determine if an intern may be exempt from federal minimum wage laws, or if the intern should be classified as an employee who would have to be paid at least minimum wage. These factors are:

1. whether the internship "is similar to training which would be given in an educational environment";
2. if the "internship experience is for the benefit of the intern";
3. whether the "intern does not displace regular employees, but works under close supervision of existing staff";
4. if the employer "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. it is understood in the employer-intern relationship "that the intern is not entitled to wages for the time spent in the internship".

Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act, *U.S. Department of Labor Wages and Hour Division,* April 2010 (http://www.nacua.org/documents/DOL_FactSheet71.pdf).

The Court in *Glatt* found that these factors supported a finding that Fox Searchlight's interns really were employees, entitled to pay. The work performed by the interns, including the filing and tracking of purchase orders, photocopying, collecting lunch orders and taking out the trash, all constituted work that displaced regular employees. Fox Searchlight did not contest that it "obtained an immediate advantage" from the interns' work and the Court found no evidence suggesting that the plaintiffs were entitled to a job at the end of their internships. *Glatt*, 2013 WL 2495140 at *13.

On the heels of this decision, the summer of 2013 has seen a deluge of class action lawsuits filed against companies on behalf of current and former interns who are now claiming they are entitled to wages under the FLSA and state laws for the work performed during their internships. This summer, unpaid interns filed suit against corporations such as Conde Nast Publications, NBC Universal, Sony, Atlantic Recording and Bad Boy Entertainment, to name a few. Deborah L. Jacobs, "Unpaid Intern Lawsuits May Reduce Job Opportunities," Forbes Magazine, September 24, 2013 (http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities/). Some companies, like Conde Nast, have decided to end their internship programmes altogether to avoid potential liability. Cara Buckley, "Sued Over Pay, Conde Nast Ends Internship Program", The New York Times, October 23, 2013. (http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?_r=1&).

Employers considering the use of unpaid interns in the United States should closely examine their internship programmes to ensure that they are in compliance with both federal and relevant state law.

(b) Protection of interns under discrimination laws

While one New York federal court opened the door to increased protection for interns under federal and state wage law, another limited the ability of interns to seek the protection of laws that prohibit discrimination and harassment against employees. In *Wang v. Phoenix*, Case No. 1:13-cv-00218-PKC, 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013), the Court held that an intern who claimed, among other things, that her supervisor invited her to his hotel room where he attempted to kiss her and subjected her to sexual advances, could not bring a claim for sexual harassment under New York's anti-discrimination laws. The Court found that because the plaintiff was unpaid, and that remuneration "is an essential condition to the existence of an employer-employee relationship," the plaintiff could not bring a claim under the statute that provided protection from harassment for "employees". *Id.* at *16.

State legislatures have taken actions in response to this decision to broaden the protections of their discrimination laws to encompass interns. For example, Oregon has amended its state anti-discrimination laws to provide protection to interns. Legislation also has been proposed in New York to protect interns from workplace harassment and discrimination on the basis of their "age, race, creed, colour, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status". Bill No. S05951, October 11, 2013. (http://assembly.state.ny.us/leg/?default_fld=&bn=S05951&term=2013&Summary=Y&Actions=Y&Text=Y&Votes=Y#S05951).

Enforcement of mandatory arbitration clauses

The past year has seen increased confusion over whether, and to what extent, mandatory arbitration clauses between employees and employers may be enforced in the United States when such clauses prevent employees from filing collective, joint, or class action claims relating to working conditions. The NLRB has taken the position that such mandatory agreements are unenforceable. In *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 at *1 (2012), the NLRB invalidated a mandatory arbitration agreement when it did not "leave open a judicial forum for class and collective claims" for employees. It ruled that employers seeking to restrain collective actions in arbitration may only "insist that arbitral proceedings be conducted on an individual basis". *Id.* at *16. Subsequently, the NLRB has invalidated other arbitration agreements between employers and employees on similar grounds. *See, e.g., Concord Honda,* Case 32-CA-072231, http://www.nlrb.gov/case/32-CA-072231 (finding that an arbitration agreement that precluded "collective legal activity" violated the NLRA); *Supply Technologies, LLC*, 359 NLRB No. 38 (2012) (invalidating a mandatory arbitration provision that mandated "any claim of any kind" against the employer would be resolved in arbitration.); *Everglades College, Inc. v. Lisa Fikki*, Case 12-CA-096026 (http://www.employerlaborrelations.com/files/2013/08/Everglades-College-Inc.1.pdf) (refusing to enforce an arbitration agreement because it applied "to all causes of action for discrimination or harassment under Federal, State, or local [law" and such a provision "would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the [NLRB].")

The NLRB's position, however, is at odds with the United States Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013), which upheld a class action waiver in an arbitration agreement. At least one federal Court of Appeals has expressly declined to follow the NLRB's decision in *D.R. Horton*, in reliance on *American Express Co*. For example, the Second Circuit Court of Appeals found that an arbitration agreement between an employee and his employer that contained a class action waiver was valid despite the plaintiff's arguments that requiring the plaintiff's claims to go to arbitration would place an undue financial burden on him. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013). Relying on the Supreme Court's decision in *American Express Co.*, the Second Circuit stated that "[d]espite the obstacles facing the vindication of Sutherland's claims… Sutherland's class-action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually." *Id.* at 298.

In the near term, notwithstanding the Supreme Court's *American Express* decision, it is unclear whether the NLRB will continue to challenge arbitration agreements that restrict an employee's rights to bring claims on behalf of a class of similarly situated employees in court. Employers entering into such agreements in the United States should be prepared for this uncertainty.

Restrictions on at-will employment policies

The NLRB also targeted employers in the past year whose "at-will" employment policies it found to unlawfully restrict employees' ability to collectively bargain. It is common in the United States for employers to have policies providing that employment with it is "at-will", such that it may be terminated with or without cause or notice, at the employer's sole discretion. Often, these policies will have language limiting the ways in which this at-will policy can be altered. The NLRB has taken a keen interest in employers whose limitations on how the at-will employment relationship may be altered, in its view, would unfairly restrict employees from forming a union. For example, in *American Red Cross Arizona Blood Services Region*, Case 28-CA-23443, 2012 WL 311334 (NLRB Feb. 1, 2012), an Administrative Law Judge found that an employer's policy providing that the at-will employment

relationship "cannot be amended, modified or altered in any way" could be found to improperly limit an employee's rights to change their at-will status through protected concerted activity.

Following up this decision, the NLRB issued a number of memoranda expressing its opinion on the validity of various at-will employment policies. Also, in *Fresh & Easy Neighborhood Market*, Case 21-CA-085615 (Feb. 4, 2013) (available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ff3bfe), the NLRB approved of an at-will policy that provided "Any such agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you." The NLRB found that because "[t]he policy does not foreclose the possibility of employees modifying their employment relationship or require employees to waive their right to future modification of their at-will status by a bargaining representative", it did not violate an employee's rights under the NLRA.

Employers in the United States with an at-will employment policy should review such policies to ensure that they do not wholly restrict an employee's ability to change the nature of the at-will relationship. Such policies should identify how the at-will relationship could be changed, and specifically identify the individual(s) at the employer who have the right to enter into any such agreement that would change the at-will relationship.

Key case law affecting employers' decision-making over dismissals, redundancies dismissals etc.

This year the United States Supreme Court made several significant rulings that will have substantial implications for employers. Among these are two decisions arising under Title VII of the Civil Rights Act of 1964, *Vance v. Ball State Univ*., 133 S.Ct. 2434 (2013), where the Court resolved a circuit split over the meaning of a "supervisor" under the act, and *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), where the Court decided the standard burden of proof a plaintiff must meet to bring a successful retaliation claim under Title VII.

(a) *Vance v. Ball State University*

Under Title VII of the Civil Rights Act of 1964, an employer may be liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behaviour, or if the harassing employee was a plaintiff's supervisor. In *Vance v. Ball State University*, the Supreme Court clarified the extent to which an employer may be liable for the actions of a supervisor. Specifically, the Court ruled that to qualify as a "supervisor" such that an employer would be liable for the employee's activity, the employee must be "empowered by the employer to take tangible employment actions against the victim" of the alleged harassment. 133 S.Ct. at 2443. Such "tangible employment actions" are those which "effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'." *Id.* (quoting *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 761 [1998]).

This decision has been seen as a victory for employers, as the class of people for whom an employer may be found vicariously liable for their harassment has been limited. If an employee accused of harassment does not have the power to take tangible employment actions against the alleged victim, then an employer must only show that it was not negligent in permitting the harassment to occur. Through the enactment and enforcement of anti-discrimination and harassment policies, an employer will have a strong case that it should not be found responsible for its employees' alleged conduct.

(b) *University of Texas Southwestern Medical Center v. Nassar*

Title VII not only protects employees from discrimination and harassment itself but also from retaliation from complaining of discrimination or harassment. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that a plaintiff must show that any such retaliation was the "but-for" cause of the employment action taken against him or her. 133 S.Ct. at 2523. This requires that the plaintiff prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer". *Id.* at 2532. In doing so, the Court overturned case law from various parts of the country that allowed a plaintiff to recover damages for retaliation under the lesser standard allowed for claims of direct discrimination or harassment, *viz.,* that retaliation was the "motivating factor" for the alleged action.

This decision has also been viewed as one that is favourable to employers. As the Court itself acknowledged in its decision, this heightened causation standard may aid in lessening the filing of frivolous retaliation claims and making it easier for frivolous claims to be disposed of by summary judgment motions prior to trial. *Id.* Thus, the decision may lead to reduced costs "both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." *Id.*

Other notable Supreme Court decisions

In addition to *Vance* and *Nassar*, the Supreme Court issued several other decisions that will impact employers:

(a) *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013):

The Supreme Court found that dismissal of a collective action brought for unpaid wages under the FLSA was appropriate where the plaintiff's employer offered to pay the plaintiff the wages he allegedly was owed, as well as reasonable attorney's fees, costs and expenses. Federal Rule of Civil Procedure 68 provides that a defendant may serve an "offer of judgment" on a plaintiff after a complaint is filed. The employer did so in *Genesis Healthcare Corp.*, but the offer was not accepted by the plaintiff. After the offer of judgment was rejected, the trial court dismissed the plaintiff's claims, finding that the offer of judgment would have fully satisfied her claims and, as no other employees had then joined her lawsuit, her claim was moot. On appeal, the Supreme Court did not decide the issue of whether her claims were, in fact, mooted by the employer's offer of judgment. Rather, the Court "assumed" that they were moot and found that on that basis her complaint was properly dismissed. The Court found that "The mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.* at 1529. Although the Supreme Court's decision did not find that an individual plaintiff's claim for unpaid wages under the FLSA is automatically mooted once an employer presents an offer of judgment, employers faced with potential collective actions under the statute may wish to consider making an offer of judgment in an attempt to avoid a collective action.

(b) *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013):

As discussed, *supra*, the Supreme Court found that arbitrations provisions that waive the right to bring a class action may be upheld, rejecting the argument that such provisions should be stricken if it can be established that the class members "would incur prohibitive costs if compelled to arbitrate under the class action waiver". 133 S. Ct. at 2308. This decision has been relied upon by at least one Court of Appeals to uphold a class action waiver in the employment context. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. Aug. 9, 2013).

(c) *Oxford Health Plans LLC v. Sutter,* 133 S.Ct.2064 (2013):

The Supreme Court affirmed that an arbitrator was within his powers to authorise class arbitration where the parties had disputed the meaning of their contract containing the arbitration clause. The Court found that under federal law a court may not vacate an arbitration award on such grounds. Courts may only vacate an arbitrator's decision in limited circumstances. The Court stated: "All we say is that convincing a court of an arbitrator's error − even his grave error − is not enough. So long as the arbitrator was 'arguably construing' the contract − which this one was − a court may not correct his mistakes." 133 S. Ct. at 2068.

Recent statutory or legislative changes

Sexual orientation discrimination

Currently, under United States federal law, employees do not have protection from workplace discrimination based on their sexual orientation. However, at least 21 states and the District of Columbia have passed laws to prohibit employment discrimination based on sexual orientation. The United States Congress has proposed the Employment Non-Discrimination Act which would protect job applicants and employees nationwide from discrimination based on sexual orientation. An earlier version of the bill was passed in the House of Representatives in 2007 but was not passed by the Senate. On November 7, 2013, however, the Senate passed the latest version of the ENDA, which

now must await approval by the House of Representatives. See Ed O'Keefe, "Senate votes to ban discrimination against gay and transgender workers," The Washington Post, November 8, 2013 (http://www.washingtonpost.com/politics/senate-set-to-approve-gay-rights-bill/2013/11/07/05717e4a-47c1-11e3-a196-3544a03c2351_story.html).

Anti-discrimination laws to protect the unemployed

Several states have passed laws to combat hiring policies that automatically reject currently unemployed job applicants. New Jersey, Oregon, and the District of Columbia have all passed laws that prohibit overt discrimination against unemployed applicants. New York City has amended its Human Rights Law to include unemployed applicants as a protected class under the law. Similar laws are pending in the state legislatures in New York, Michigan, Ohio, Florida, and Pennsylvania.

Likely or impending reforms to employment legislation and enforcement procedures

Validity of NLRB decisions made by Recess appointees

The Supreme Court will be hearing arguments in January 2014 on the validity of President Obama's appointment of certain members of the NLRB. Should the appointment of these members be found to have been made in violation of the United States Constitution, any decisions issued by or rules promulgated by the NLRB while these members were on the board could be invalidated.

Under the United States Constitution, the President may nominate and appoint certain officers of the United States, including the five members of the NLRB, with "the Advice and Consent of the Senate". U.S. Const. art. II, § 2, cl. 2. However, the Constitution also provides the President with the power to fill "all Vacancies that may happen during the Recess of the Senate". *Id.* art. II, § 2, cl. 3. In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) *cert. granted*. 133 S. Ct. 2064, the Court of Appeals for the District of Columbia found that President Obama's appointment of three members of the NLRB without the advice and consent of the Senate was improper because the appointments were made during an in-session recess of the Senate, and not during a recess between sessions of the Senate. The Court also found that the appointments were improper because to be valid, the filling of a vacancy that happens during a recess must be done in the same recess in which it arose and not, as done with President Obama's appointments to the NLRB, appointments to vacancies that already existed prior to the recess. This decision has been appealed to the Supreme Court which has scheduled oral argument for January 2014.

Recent decisions suggest EEOC must tighten investigative procedures regarding its strategic enforcement plan (SEP)

The United States Equal Employment Opportunity Commission issued its Strategic Enforcement Plan within the last year, setting forth a framework to "stop and remedy unlawful discrimination" in the workplace from 2013 to 2016. U.S. Equal Employment Opportunity Commission, *Strategy Enforcement Plan FY 2013-2016*, at 4 (*available at* http://www.eeoc.gov/eeoc/plan/upload/sep.pdf). The EEOC identified six target areas where it would focus on eliminating discriminatory practices:

1. elimination of class-based recruiting and hiring;
2. protection of immigrant, migrant and vulnerable workers subject to disparate pay and other discriminatory policies;
3. targeting emerging and developing issues related to new legislation, judicial and administrative decisions;
4. enforcement of equal pay laws based on gender;
5. targeting practices that discourage individuals from utilising the legal system; and
6. deterring workplace harassment through enforcement and outreach.

In *E.E.O.C. v. CRST Van Expedited, Inc.,* 679 F.3d 657 (8th Cir. 2012), the United States Court of Appeals for the Eighth Circuit found that that the EEOC had failed to properly investigate and conciliate claims it brought on behalf of a class of female employees who alleged they had been subject to sexual harassment and retaliation. For two years following the commencement of its suit, the EEOC failed to identify the women who made up the class of employees on whose behalf it was bringing claims. The EEOC eventually identified 270 women as part of its class. The claims of 120 of those women were

dismissed after the EEOC refused to produce them for deposition. The Court subsequently dismissed the majority of claims brought on behalf of the remaining 150 plaintiffs, including dismissing claims of 67 women, where the Court found that the EEOC had "failed to conduct a reasonable investigation and *bona fide* conciliation of the[ir] claims". *Id.* at 671. Indeed, it was found that the EEOC "did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed". *Id.* at 673. The Eighth Circuit found that the EEOC did not conduct a proper investigation prior to filing its complaint, but rather "discovery in the resulting lawsuit as a fishing expedition to uncover more violations". *Id.* at 676. After the dismissal of these claims was upheld by the Court of Appeals, the trial court ordered that the EEOC pay $4.7m in attorney's fees and expenses to defendants for bringing "unreasonable or groundless" claims. *EEOC v. CRST Van Expedited, Inc*., Case No. 07-CV-95, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).

Similarly, in *E.E.O.C. v. Freeman*, 2013 WL 4464553 at *1 (D. M.D. Aug. 9, 2013), a federal judge dismissed an action brought by the EEOC in which it alleged that an employer's nationwide practice of conducting credit and criminal background checks on job applicants was discriminatory because it had a disparate impact on African American, Hispanic, and male applicants. In rejecting the EEOC's claims, the court chastised the EEOC for relying on nationwide data that constituted "an egregious example of scientific dishonesty". *Id.* at *10. The Court found that the EEOC's expert's reports were "rife with analytical error", "based on unreliable data", and "so full of material flaws that any evidence of disparate impact derived from an analysis of its contents must necessarily be disregarded". *Id.* at *6-12. Based on the unreliability of these reports, the Court granted the defendant's motion to preclude the expert testimony. *Id.* at *13. The Court concluded that "[t]he story of the present action has been that of a theory in search of facts to support it. But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the Defendant." *Id.* at *17.

Validity of NLRB notice requirements

In 2011, the NLRB implemented a rule requiring that private-sector employees post a notice to their employees of their rights under the NLRA. Pursuant to the rule, employers that failed to post such a notice would be subject to: (1) a finding that the employer engaged in an unfair labour practice; (2) a suspension of the six month statute of limitations for filing an unfair labour practice charge; and (3) a finding that the employer's failure to post the required notice constituted evidence of the employer's unlawful anti-union motives.

Two Courts of Appeals, however, have issued decisions finding that the NLRB's rule was invalid. In *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d at 959 (D.C. Cir. 2013), the Court of Appeals for the District of Columbia found that the notice requirement violated Section 8(c) of the NLRA, which states that "[t]he expressing of any views . . . or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit". 29 U.S.C. § 158(c). The Court found that Section 8(c) protects both an employer's right to speak and right *not* to speak, and as such, the NLRB's rule punishing employers for exercising their right not to speak, violated Section 8(c).

The Fourth Circuit Court of Appeals also invalidated the notice requirement, albeit on different grounds. In *Chamber of Commerce of the United States v. NLRB,* 721 F.3d 152 (4th Cir. 2013), the Court found that Congress had not granted the NLRB the authority to require that employers post notices in the workplace when it passed the NLRA. Rather, the NLRB was only given the power to enact rules "necessary to carry out" provisions of the act. Because the NLRB is not charged under the act "with informing employees of their rights under the NLRA, we find no indication in the plain language of the Act that Congress intended to grant the Board the authority to promulgate such a requirement". *Id.* at 160-161.

The Supreme Court has yet to rule on this issue. It remains to be seen whether the NLRB will continue in its attempts to require that employers post notices in the workplace in jurisdictions where the rule has not yet been overturned.

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