



**This Employer Webinar Series program  
is presented by Spencer Fane Britt & Browne LLP  
in conjunction with United Benefit Advisors**

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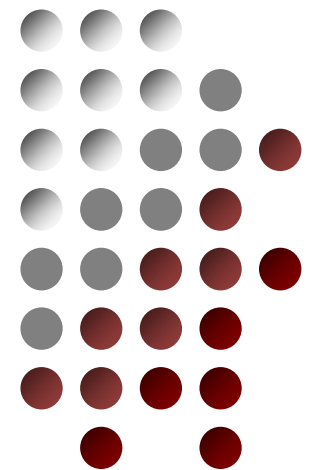


# The National Labor Relations Act's Application to the Nonunion and Union Workplace

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Brian Christensen, Esq.  
David Kight, Esq.

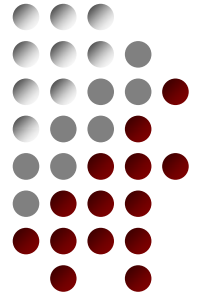
September 13, 2011



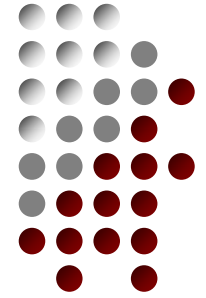
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# Presentation Overview

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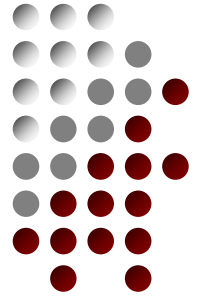


- History of unionization in the United States
- Overview of the governing law
- Recent developments impacting non-union employers
- Scenarios illustrating application of legal principles to the non-union workplace



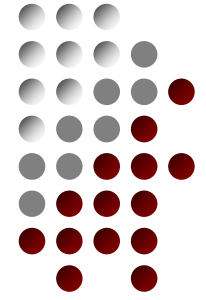
# History of Unionization

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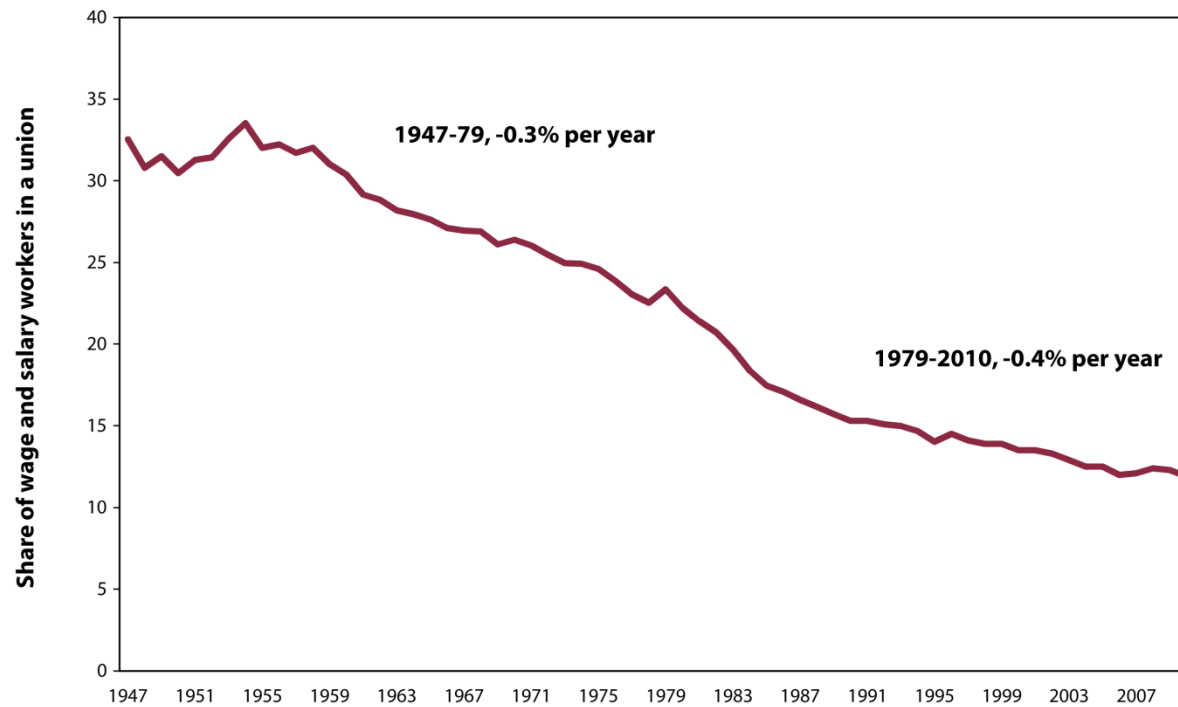


- National Labor Relations Act was passed in 1935 in part to address several states which had enacted their own laws.
- Highest percent of U.S. workers unionized in 1954 – 34.8%
- Beginning in late 1970's, percentage of unionization drops rapidly
- 1990's unions begin aggressively seeking to reverse trend; winning more elections but still losing membership
- Union density at lowest level since passage of NLRA

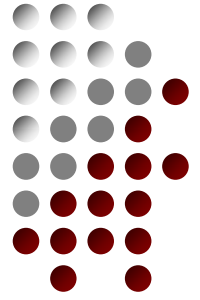
# Unionization Trends



**Unionization declines slowly and then more quickly:**  
Union membership, 1947-2010



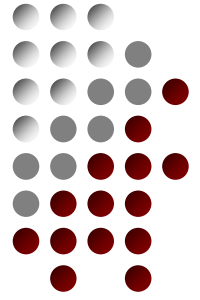
# Union Membership Rates Today



- While Union membership rates are dropping in the public sector, the drop in the private sector is more significant.

	Public Sector	Private Sector	Overall
2010	36.2%	6.9%	11.9%
2000	37.5%	9.0%	13.5%

# Union Density by State



## Highest Density

New York (24.2%)  
Alaska (22.9%)  
Hawaii (21.8%)  
Washington (19.4%)  
California (17.5%)  
New Jersey (17.1%)

## Lowest Density

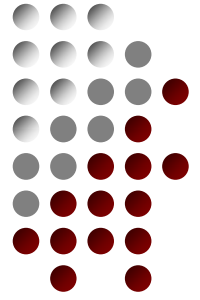
North Carolina (3.2%)  
Arkansas (4.0%)  
Georgia (4.0%)  
Louisiana (4.3%)  
Mississippi (4.5%)  
South Carolina (4.6%)

The overall decline in union density can be attributed to several factors including the movement to a service economy and the movement of jobs to the sunbelt region of the country where union density is lower.

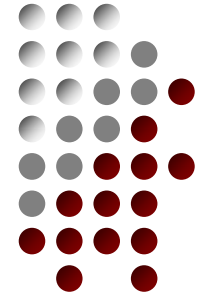


# Unions' Attempts to Counter Decline

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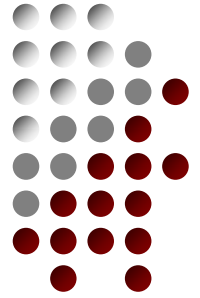
- Backing of various candidates
  - e.g. 2008 campaign cycle SEIU spent \$85M to fund President Obama's campaign
- Legislative initiatives
  - 2009 "Employee Free Choice Act"
- Funding of various state and local campaign efforts



# Legal Framework

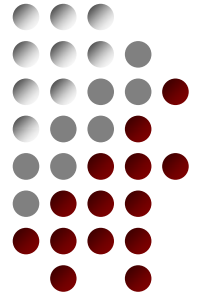
# National Labor Relations Act

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- Passed in 1935 to protect rights of employees to organize
- Section 7 of the “Act” employees have the right to engage in protected concerted activity or to refrain from doing so
- The Act is interpreted and applied by the National Labor Relations Board and its various Regional Directors throughout the United States

# Typical Prohibited Conduct



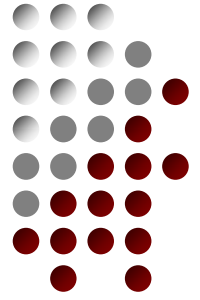
## Employer

- Threats
- Interrogation
- Promises
- Surveillance/Spying
- Any other conduct that would “chill” an employee’s right to engage in protected concerted activity

## Labor Organization

- Threats
- Coercion
- Violence
- Discrimination

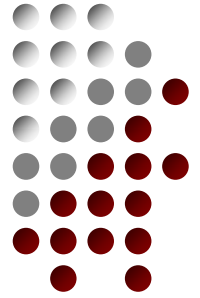
# National Labor Relations Board



- The NLRB was formed to oversee the NLRA and be the independent agency overseeing labor relations rights for employers.
- The Board is comprised of five members who are appointed (subject to Senate confirmation) for five year, staggered terms. **There are only 3 members currently.**

# Basic Rights Now

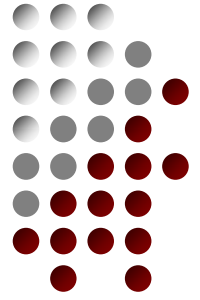
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- Employees have a right to a secret ballot election to select or refuse union representation.
- Collective bargaining between employers and employees must be conducted in good faith, but no one forces an agreement on either party.

# Rights of Employees

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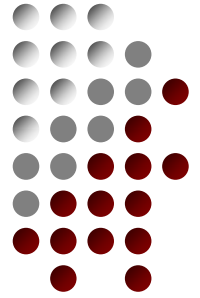


The law gives employees the right to:

- Organize, help, or join a union;
- Engage in Collective Bargaining;
- Engage in Protected Concerted Activity;
- or not participate.

# Rights of Employers

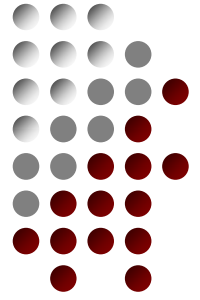
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The law gives the company the right to share its opinion about unions and organizing verbally, in writing, in videos, e-mail, etc.

\*\*\*Threats do not count as “opinions.”

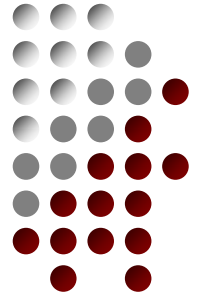
# Enforcement Power by the NLRB



- What remedies – if any – are available to the NLRB if an employer violates one of the rules?
  - Backpay to a fired worker;
  - Reinstatement;
  - Court Injunctions;
  - Ordering an Employer to Bargain with a Union;
  - **One of the few agencies that has the ability to investigate, rule, and seek enforcement.**

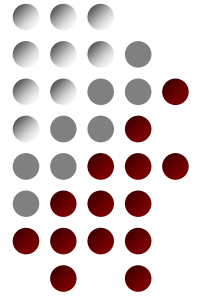
# What's happening now...

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- The NLRB has recently held that an employer's discipline of an employee for comments made on social media – even if the employer is not unionized – violates the NLRA.
- The NLRB has just issued a rule requiring all employers to post a notice about their rights under the NLRA.

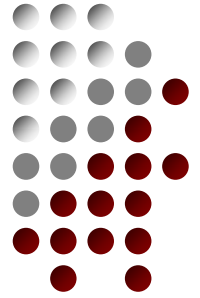
# What Might be Coming...



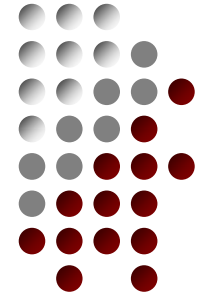
- Employers forced to give access to their e-mail addresses and intranet to labor unions who want to organize their employees.
- Employers who want to have an investigatory interview will be required to permit a co-worker to be present. - *Weingarten rights.*

# Changes Sought by Labor

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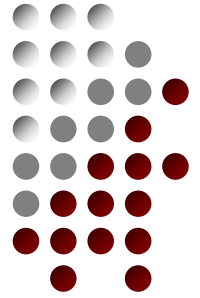
- Giving unions access to the workplace to hold meetings of employees during the work day.
- Requiring employers to pay the union the “costs” of organizing for an unfair labor practice violation during a labor campaign.



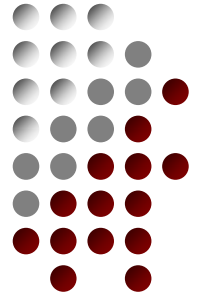
# Recent Developments & Examples

# *Employee Discussion of Wages*

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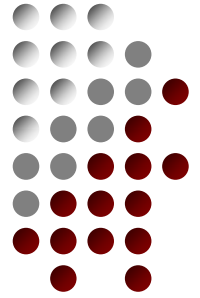
# The Breakroom Discussion



Recently bonuses and raises were announced. A supervisor notices four employees sitting in the break room sharing paystubs and discussion their respective raises. One of the employees is visibly upset because she does not she has been treated fairly compared to the others. Your company has a policy prohibiting employees from sharing non-public information regarding wages and bonuses. Should the supervisor stop the discussion? Should the company enforce its policy?

# The Breakroom Discussion

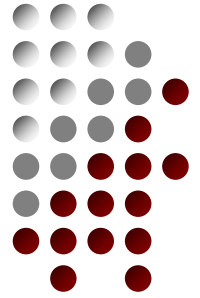
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Under the Act, employees have the right freely to discuss terms and conditions of employment, even if it results in hurt feelings. Any employer policy interfering with that right is unlawful. Even if the policy is never enforced, the mere presence in the handbook is unlawful. The employer must revise its handbook to remove that policy.

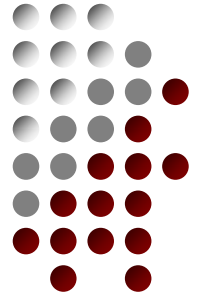
# *Employee Meetings*

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# The Staff Meeting (No. 1)

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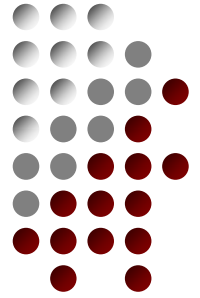


During a question and answer session at a staff meeting an employee stands up and begins loudly to complain about certain unsafe conditions that he believes exist at the plant. He becomes unruly and will not sit down when asked to do so.

Can he be disciplined for this?

# The Staff Meeting (No. 1)

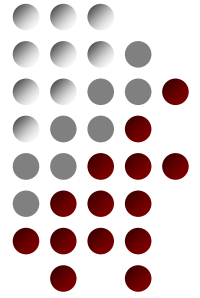
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Discipline may be appropriate for his conduct, i.e. interrupting the meeting and refusing to sit down when asked to do so. Discipline for his message is a more difficult question as illustrated by the next example.

# The Staff Meeting (No. 2)

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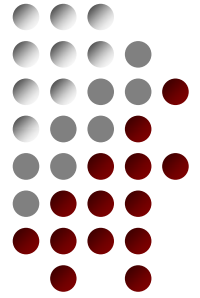


During the same staff meeting, another employee stands up, interrupting the meeting, and agrees with the first employee. She says that all the employees are worried for their safety and that management is just ignoring them. She demands that something be done about it.

Is it lawful to discipline this employee or to tell her to sit down and be quiet?

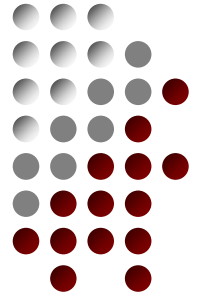
# The Staff Meeting (No. 2)

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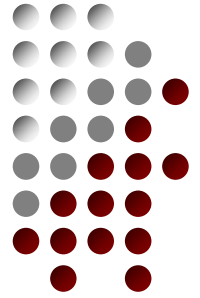
Because she presented the safety issue as one of common interest, she is engaged in protected concerted activity. However, to the extent her conduct is disruptive she may be disciplined for her ongoing interruption of the meeting and for refusing to comply when asked to stop interrupting the meeting. Focus on the conduct not the message.

# The Employee Committee



An employer asks a number of employees to form a committee to help review certain health benefit options. As the process progresses, the committee identifies what it thinks is the best option for the company's employees. The president of the company has several meetings in which he sits down with the committee to negotiate over certain elements of the committee's proposals. He gets fed up with the committee's approach and disbands it. Any issues?

# The Employee Committee

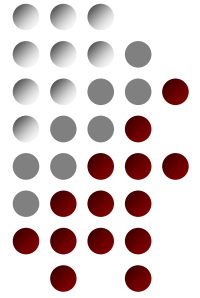


By negotiating with the employee committee, the president may have just recognized a union. His ability to disband the employee committee may be limited and he may have to continue to negotiate with the group.

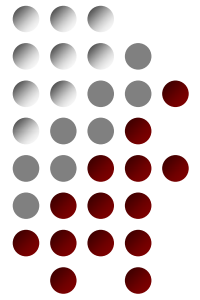
**Practice Point:** The idea of working with employees to solve a problem is a good one. But, be careful in how you form the committee and implement it. A better approach may be to ask the committee to provide several different options which the company can evaluate.

# *Activities by a Single Employee*

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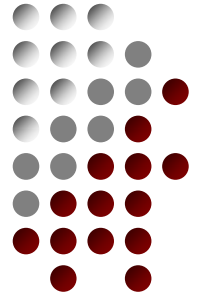
# The Work Stoppage



On a break, a supervisor finds an e-mail by the printer from one of the company's best employees to all other employees complaining about the recent pay raises that he believes were subpar. The e-mail appears to just be a draft that has not been sent yet. The e-mail suggests that at 2pm that day all the employee should stand up, stop working and ask for more pay. He says that if everyone stops working at the same time management probably will cave and give everyone some kind of raise. Your supervisor wants to nip this in the bud before it spreads or gets out of hand. Can she?

# The Work Stoppage

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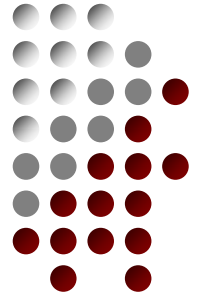


This is an example of preparation for group or concerted action. The Board protects employee efforts to prepare to engage in concerted activity as much as it protects the concerted activity itself.

Practice Point: Outside of the healthcare environment, a work stoppage or strike is not something an employer can delay.

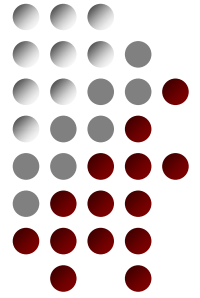
# *Electronic Mail & Social Media*

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# Employee Use of E-mail

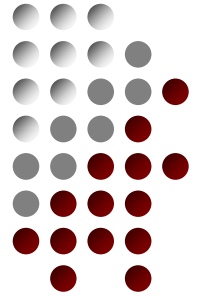
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Your IT Department's periodic monitoring of e-mail and IM traffic has determined that a group of employees has formed a book club. They use your e-mail and IM system to discuss the various books they are reading. Since you allow employees to use your systems for incidental personal communications, you permit this. Several weeks later several employees begin e-mailing the SEIU inviting it to come into the work place and meet some fellow employees. Your company president is anti-union and wants to shut this off. Would that be lawful?

# Employee Use of E-mail

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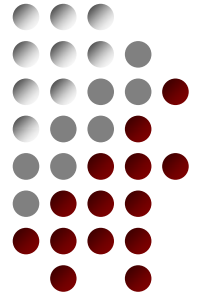


Because your company permits employees to use e-mail and IM for incidental personal purposes, you cannot prohibit employees from using to organize (or resist organizational efforts) by unions. At this point, it likely would be unlawful to stop all personal use of your e-mail systems because it would be interpreted as being directed at the protected activity.

Practice point: Abuse of e-mail, however, might be something to evaluate. If, in the above example, an employee sent an SEIU flyer around that was so large it shut down the e-mail system, you could consider discipline.

# Facebook

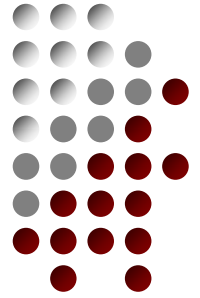
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Five employees do not like their co-worker. They believe the co-worker is a slacker and fakes illnesses to get out of work. They post derogatory messages on her Facebook page containing obscenities and openly expressing their negative feelings toward her. The victim complains. Following an investigation, the five employees are discharged for harassment under the company's zero tolerance policy. Any problem with the discharges?

# Facebook

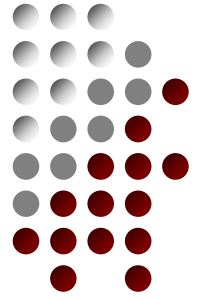
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Most likely. Last week an administrative law judge of the Board held that the five employees were engaging in concerted protected activity for which they could not be discharged. The judge held that the Facebook postings were no different than “water cooler” talk and could not be interfered with. He held that even though the conversations were not directed to the employer, because they involved terms and conditions of employment they were protected. The judge ordered the employees reinstated. An appeal to the Board is pending.

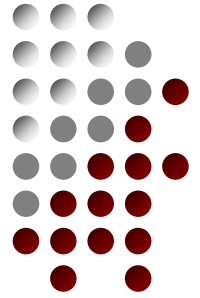
# *Employee Handbooks*

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# Common Policies

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**Policy 1:** Employees should only disclose information or messages from the company's systems to authorized persons.

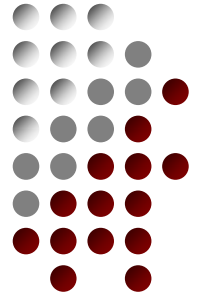
**Policy 2:** Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge.

**Policy 3:** Voice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy.

**Policy 4:** You may be disciplined for performing activities other than Company work during working hours.

# Common Policies

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**Policy 1:** Employees should only disclose information or messages from the company's systems to authorized persons. **UNLAWFUL**

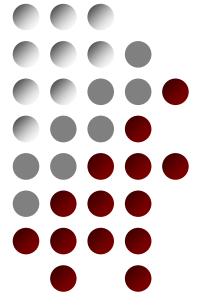
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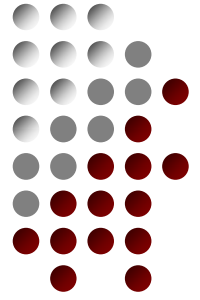
# *Weingarten Rights*

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# Employee Representative During Discipline

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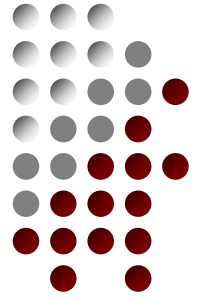


An employee's supervisor asks employee Steve Smith to accompany him to Human Resources to participate in an interview. The interview is part of an investigation into allegations that the employee, along with his co-worker, John Jones, sexually harassed a female co-worker. Human Resources wants his side of the story before deciding how to proceed. Before the interview can proceed, Steve demands that he be allowed to have a representative at the meeting. He asks that John be that representative.

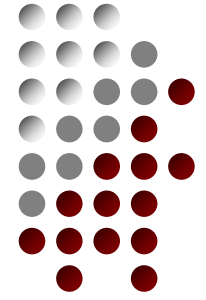
Do you have to accede to his demand?

# Employee Representative During Discipline

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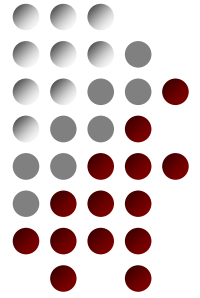


Presently, no. An employee in a non-union setting does not have the right to a representative. However, prior to 2004 he would have enjoyed such a right and likely had the right to have his co-accused present as his chosen representative. The Board has shifted its position several times on this issue and may do so again.



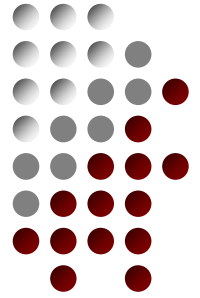
# Section 7 Rights Poster

# Notice Posting



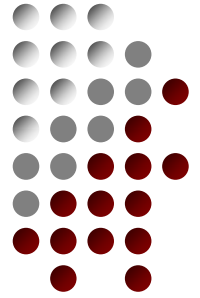
- Proposed rule would require nearly all U.S. employers to post a notice informing employees of their rights under Section 7 of the Act
- The notice concept was originally proposed to the Board in 1993
- Adopted by the current Board and issued on August 30, 2011
- Employers who fail to properly post the notice will be subject to liability for committing an unfair labor practice and may face tolling of the normal 6-month statute of limitations for filing an unfair labor practice charge

# Text of Notice



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- The notice concept was originally proposed to the Board in 1993
- Adopted by the current Board and issued on August 30, 2011
- Employers who fail to properly post the notice
  - will be subject to liability for committing an unfair labor practice and **may face tolling of the normal 6-month statute of limitations for filing an unfair labor practice charge**
  - May also result in a presumption that employer had “anti union animus” with regard to other violations

# Notice to Employees of Following Rights



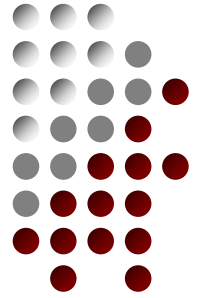
## **EMPLOYEES HAVE THE RIGHT TO**

- Organize a union to negotiate with employer
- Form, join or assist a union
- Collective bargaining
- Discuss wages and benefits and other terms and conditions of employment with co-workers
- Take action with one or more co-workers to improve working conditions
- Strike or picket
- Choose not to do any of these things

## **EMPLOYERS MAY NOT**

- Prohibit you from talking about a union during non-work time
- Question you about your union support
- Retaliate against you because of your union sympathies or activities
- Threaten to close your workplace if you choose a union
- Make promises to encourage you to refrain from choosing a union
- Prohibit you from wearing union paraphernalia except under special circumstances
- Spy on or videotape union activities or pretend to do so

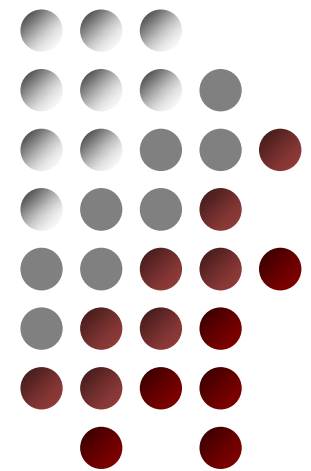
# Additional Posting Issues



- Employer must provide notice in other languages if non-English speaking employees in workplace
  - Only applicable once non-English form available from NLRB
- Notice must be posted where other employment-related postings placed such as in breakrooms
- Employers who post notices to employees on internet or intranet required to post notice in manner similar to other notices
- Posting Date: November 14, 2011
- Notice will be available from NLRB and Regional Offices starting October 1, 2011
- Could be challenged in Court.

# Labor Organizing

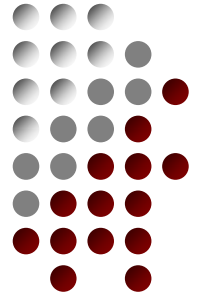
How and Why it Happens



**SPENCER FANE**  
BRITT & BROWNE LLP

# 10 Reasons Why Employees Unionize

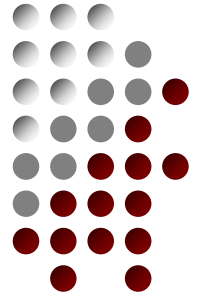
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- Inconsistent and unfair application of rules.
- Gripes, complaints & grievances ignored.
- Failure to address the little things.
- Lack of due process / progressive discipline.
- Disregard for seniority.

# 10 Reasons Why Employees Unionize

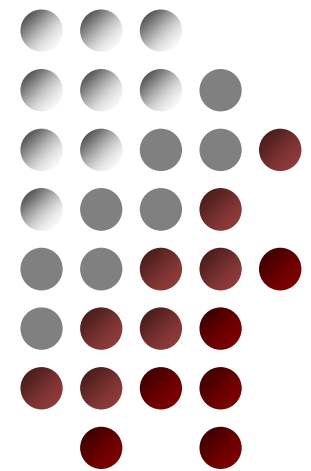
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- Favoritism and disrespect.
- Poor working conditions.
- Passing the buck – “I know it’s wrong, but...”
- Failure to keep promises.
- Changing rules and policies with no notice or input.

# Policies Today

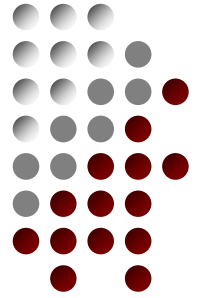
## Avoiding A Letter from the NLRB



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# Policy Issues

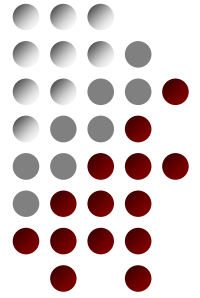
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- *Prohibition on discussing wages - Bad*
  - “It is the policy of WonderCo that personnel matters such as an individual’s wages and benefits are personal in nature and are not to be discussed by employees.”

# Policy Issues

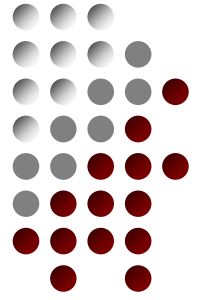
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- *Prohibition on discussing wages - Good*
  - “It is the policy of WonderCo that personnel matters such as an individual’s wages and benefits are personal in nature and the Company will not divulge this information to anyone other than the individual employee.”

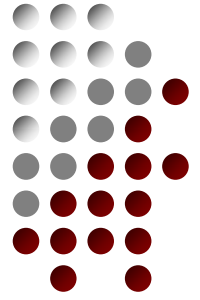
# Policy Issues

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- *E-Mail Prohibition - Bad*
  - “The Use of E-mail for any non-business purpose is strictly prohibited.”

# Policy Issues

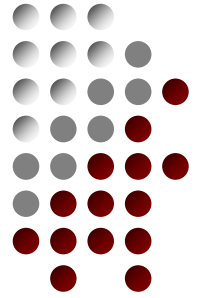


- *E-Mail Prohibition - Good*

- “Any misuse of e-mail, or use of e-mail as part of another violation of company policy shall be deemed a violation of company policy. Management reserves the right to monitor any and all e-mail, instant messages, or any communication made over its computers, mobile devices, networks or other property.”

# Policy Issues

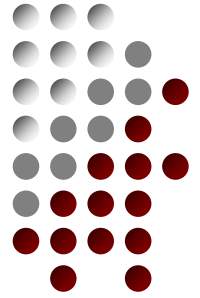
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- *Mandatory Arbitration - Bad*
  - “This arbitration policy applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee’s employment with WonderCo or the termination of that employment.”

# Policy Issues

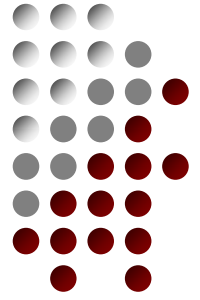
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- *Mandatory Arbitration – Good*
  - “This arbitration policy applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee’s employment with WonderCo or the termination of that employment. *Claims which are not covered by this Policy and which must be pursued in their appropriate forums include claims under the National Labor Relations Act.*”

# Policy Issues

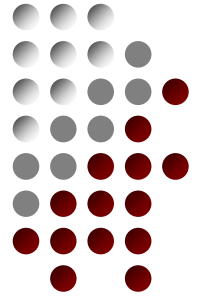
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- *Solicitation and Distribution - Bad*
- “Solicitation and distribution is prohibited at all times and throughout WonderCo’s premises. It is prohibited to engage in this behavior during work time and in work areas. Posting or placing non-business materials in working areas or common areas (including break rooms) is prohibited without prior authorization.”

# Policy Issues

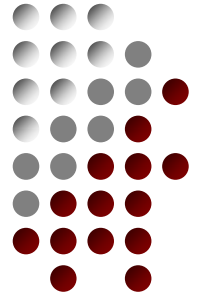
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- *Solicitation and Distribution - Good*
- “Solicitation and distribution which interferes with work or service of clients is prohibited at all times and throughout WonderCo’s premises. Solicitation and distribution are prohibited except in non-work areas and non-work times. Any posting or placement of non-business material may be removed if it is offensive (i.e., sexually explicit, use of racist language, violation of anti-discrimination policies).”

# Policies to Avoid in Handbooks

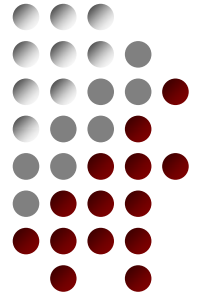
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- Preference to be Non-Union or worse.
- Requiring Employees not to make comments adverse to the employer.

# QUESTIONS/DISCUSSION

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**Brian Christensen**

(913) 327-5106

bchristensen@spencerfane.com

**David Kight**

(816) 282-8303

dkight@spencerfane.com



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