

HEALTH CARE ASSOCIATION OF NEW JERSEY



**EMPLOYMENT LAW
UPDATE
2011**

Presented By:

**Richard W. Schey, Esq.
David Islinger, Esq.
Jackson Lewis LLP
220 Headquarters Plaza, East Tower, 7th Floor
Morristown, New Jersey 07960
www.jacksonlewis.com
(973) 538-6890**

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SOCIAL MEDIA ISSUES IN THE WORKPLACE



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Social NOTworking

- How many working hours are lost to social networking?
- Facebook has over 300 million active users
- 50% of Facebook users log on every day
- 22% of employees visit social networking sites 5 or more times per week; many admit to logging in *while at work*
- 75 million Twitter registered users
- *Texting at Work*

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Social Media: Information On The Web

- Largest growth not by teenagers but by 25 to 54-year-olds



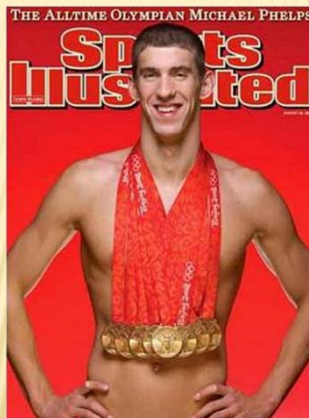
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SOCIAL MEDIA: KEY CHALLENGES FOR EMPLOYERS

- Negligent hiring/supervision
- Discrimination/Harassment/Retaliation
- Divulgence of trade secrets or proprietary information
- Reputational harm to employees
- Reputational harm to employers
- Privacy pitfalls
- Legal constraints on employee discipline

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WOULD YOU HIRE/RETAIN HIM AS AN EMPLOYEE?



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DO YOU HAVE THE SAME RESPONSE?



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SOCIAL MEDIA: NEGLIGENT HIRING/SUPERVISION

- An employer may be held liable for an employee's wrongful acts if the employer knew or had reason to know of the risk the employment created
- Doe v. XYZ Corp., N.J. Super. 122 (2005)(Court found employer held employer had duty to investigate and respond in case of alleged negligent supervision of employee who was criminally charged with child pornography using workplace

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SOCIAL MEDIA – DISCRIMINATION, HARASSMENT AND RETALIATION VS. NEGLIGENT HIRING/SUPERVISION

- Employer viewing of applicant's personal information on social networking/blogging site may trigger protections of antidiscrimination laws
- Sites may contain information regarding age, race, national origin, disabilities, sexual orientation religion and other protected characteristics
- Difficult for employer to prove it did not rely upon personal information
- Even if not unlawful, risk of relying on inaccurate or outdated information

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SOCIAL MEDIA – DISCRIMINATION, HARASSMENT AND RETALIATION VS. NEGLIGENT HIRING/SUPERVISION

Pietrylo v. Hillstone Restaurant Group

2009 U.S. Dist. LEXIS 88702 (D. N.J. 9/25/09)

- ✗ Waiter created MySpace page
- ✗ Group was private-by invitation from creator
- ✗ Postings about managers, services standards, sexual commentary & illegal drug use
- ✗ Accessed on non company computers and off work hours
- ✗ Invited member permitted manager to view site while she was logged on with permission
- ✗ Manager reported information to other managers

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SOCIAL MEDIA – DISCRIMINATION, HARASSMENT AND RETALIATION VS. NEGLIGENT HIRING/SUPERVISION

- ✘ Management requested employee's password for access when she was not present
- ✘ Plaintiff, the site's creator, was fired as postings on site "violated company policy of professionalism and a positive attitude"
- ✘ Jury found for Plaintiff as management coerced the password from the employee & management was then not an authorized user
- ✘ Jury found employer violated employee's privacy and motion for judgment as a matter of law denied

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SOCIAL MEDIA – DISCRIMINATION, HARASSMENT AND RETALIATION VS. NEGLIGENT HIRING/SUPERVISION

Lessons Learned

- ✘ First-Verify there is a substantial need to access password protected social media site
- ✘ Receive and document appropriately obtained authorization to enter a site - i.e. have a witness
- ✘ Review the site for any notation that it is Private
- ✘ Don't over extend company policy on privacy to search non-company related sites and equipment
- ✘ Don't log in under false pretenses!!

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SOCIAL MEDIA: DISCRIMINATION, HARASSMENT AND RETALIATION

- Electronic communications provide employees with an opportunity for misuse and can be used as evidence to support a harassment or discrimination claim
- Knew or should have known standard applies
- *Blakely v. Continental Airlines, Inc.*, 164 N.J. 38 (2000)(Company has duty to take effective measure to stop harassment via “Crew Member Forum” once it knew or should have known harassment was taking place)
- What about off-duty conduct?



OFF DUTY SOCIAL NETWORKING

- ✘ Appropriate dialogue between co-workers?



REPUTATIONAL HARM TO EMPLOYEES

- Defamation - Plaintiff must prove the defendant published a false statement concerning the plaintiff that tends to harm the plaintiff's reputation
- Employer can be liable if the employee had apparent authority to speak on its behalf – Beware of personal references!!



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SOCIAL MEDIA: REPUTATIONAL HARM TO EMPLOYERS

- Blogs and other electronic communications also may have dramatic negative consequences for employers:
 - Domino's, Burger King, KFC – Employees posted video/photographs harming company image
 - Former Intel employee sending 200,000 e-mails to 35,000 employees complaining about his treatment by Intel
 - California jury awarded employer \$775,000 in compensatory and punitive damages against former employees for "cybersmearing" of employer. *Varian Medical Systems, Inc. v. Delfino*, Santa Clara Super. Ct. No. CV780187 (Dec. 18, 2001)

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Legal Constraints on Employee Discipline

- Expression of political opinions (e.g. New Jersey)
- Legal off-duty activities (e.g. California, Colorado, Connecticut, New York)
- Wrongful termination in violation of public policy (arrests, convictions, bankruptcy, workers' compensation history)
- Whistleblowing (SOX, Wage & Hour)

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METHODS TO MINIMIZE RISK

- Develop policy on whether HR/Hiring Managers can access social networking sites for job applicants/employees
- HR/IT personnel responsible for monitoring/using electronic information are properly trained to avoid improper access and to screen out information that can not be lawfully considered in the application and/or disciplinary decision-making process
- Consider prohibiting access to private password social networking sites without proper authorization. Do not allow third party to "friend" an applicant to gain access to site
- Ensure appropriate employment decisions are made based on lawful verified information

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METHODS TO MINIMIZE RISK

- Consider whether to block employee access to social networking sites through company computers or to limit access during working hours
- Consider restriction on professional references via LinkedIn
- Investigate complaints of discrimination/harassment stemming from posts on social networking/blogs
- Ensure security of employer sponsored blogs
- Provide guidelines on appropriate terms of use of employer sponsored sites/blogs
- Implement a social networking/blogging policy which explains diminished right to privacy

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KEY ELEMENTS OF ELECTRONIC COMMUNICATIONS POLICIES

- Consider Company philosophy – business
- No expectation of privacy when using company equipment – however attorney client privilege may apply to communication with counsel
- Employees must abide by non-disclosure and confidentiality agreements/policies
- Only individuals officially designated may speak on behalf of the Company
- “Bloggers Beware” - Require a disclaimer:

“The views expressed in this blog are my personal views and opinions and do not necessarily represent the views or opinions of my employer”

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KEY ELEMENTS OF ELECTRONIC COMMUNICATIONS POLICIES, CONT.

- Company policies governing corporate logos, branding, and identity apply to all electronic communications
- Employees are prohibited from making defamatory comments when discussing the employer, superiors, co-workers, products, services and/or competitors
- Employees must comply with company policies with respect to their electronic communications, such as policies prohibiting harassment and standards of conduct
- Company reserves the right to take disciplinary action if the employee's communications violate company policy

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KEY ELEMENTS OF ELECTRONIC COMMUNICATIONS POLICIES

- Do not prohibit employees from discussing terms and conditions of employment
- If allowed at work, time spent social networking/blogging/texting should not interfere with job duties
- Remind employees expected to comport themselves professionally both on and off duty
- Remind employees that off-duty conversations can have significant workplace affects
- Avoid “Big Brother” image while protecting the Company and its employees
- Get a signed acknowledgment of the policy

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11 CHANGES IN '11 – AN OVERVIEW

- Federal Legislation
 - + Health Care Reform – what does it mean for you?
 - + The 2011 Congress – what will happen next?
- Labor Law Changes Without Legislation – What changed and what is about to change?
 - + Presidential Executive Orders
 - + The National Labor Relations Board
 - + The Department of Labor
 - + State Initiatives
- Where Does The Labor Movement Go From Here?
- What You Should Be Doing Now

CHANGE #1 – HEALTH CARE REFORM

- A caveat about health care reform
 - Will it survive the 2011 Congress and challenges in Court?
- Employer mandates
 - Start to apply in 2011
 - Some don't apply to grandfathered plans
 - Big changes in 2014
- Grandfathering – excepts plan from certain mandates
 - Make sure you take steps to insure your plan doesn't lose grandfathering, unless it makes sense to do so – know the pros and cons.
- How to protect your organization now?
 - Consider re-opener provisions to offset additional costs
 - Stay up to date on the latest developments
- What about the union-free employer?

CHANGE # 2 – WHERE WILL THE ACTION BE? IMPACT OF MID-TERM ELECTIONS

- With Republican control of the House, labor-related legislative initiatives will be hard to pass
 - EFCA *as a federal law* is dead for now
- Watch for strong initiatives from the Administration, NLRB, DOL and other agencies

CHANGE # 3 – PRESIDENTIAL EXECUTIVE ORDERS

✘ Hypothetical

✘ Congratulations! Your Company was just selected to sell \$100,000 in widgets to ABC Company. ABC is using them as part of their work fulfilling a government contract. Although ABC's contract does not mandate the use of widgets, ABC has determined they are the best product and will be needed to fulfill its government contract.

- Does your company have a labor posting requirement?
- If so, where do you have to place the poster?
- What languages must be on your poster?

Change # 3 – Presidential Executive Orders

GOVERNMENT CONTRACTORS – E.O. 13496

EMPLOYEE RIGHTS

UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times, or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

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CHANGE # 3 – PRESIDENTIAL EXECUTIVE ORDERS

× Three Other Executive Orders Also In Effect in '11

- **“NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS”- E.O. 13495**
Service contractor must offer jobs to prior contractor's employees to help preserve the union and union jobs
- **“ECONOMY IN GOVERNMENT CONTRACTING”- E.O. 13494**
Contractor cannot use government funds to pay cost incurred for labor consultants, union-free training or lawful communications concerning unions
- **PROJECT LABOR AGREEMENTS - E.O. 13502**
Federal agencies can require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement (PLA) with one or more labor organizations

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CHANGE # 3 – PRESIDENTIAL EXECUTIVE ORDERS

✘ Employer Tips – What you should do in 2011

- Determine if you are a federal contractor under any of the new Executive Orders
 - Consider the amount of the contract and the contract language itself
 - If so, develop a compliance plan for each E.O.
- + Employers also should consider an implementation plan which includes actions such as the following:
 - Communications strategy
 - Vulnerability assessment
 - Training for managers
- + Note: Whether or not you are a federal contractor under any existing E.O., all Employers must watch the Notice of Proposed Rule Making regarding a new labor law posting
 - The details
 - What you can do now

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CHANGE # 4 – NATIONAL LABOR RELATIONS BOARD ACTIVISM

- **New Majority**
- **New Acting General Counsel**
 - 1st Initiative – promptly seek federal court injunctions for unlawful discharges in organizing campaigns
 - 2nd Initiative – new remedies for ULP settlements
- **The New Labor Board can re-write labor law in two ways:**
 - Through **Adjudication** – Reversing pro-employer Bush Board decisions and issuing new decisions favoring unions in novel ways
 - Through **Rulemaking** – Issuing rules that permanently shift the balance in favor of unions

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CHANGE # 4 – NLRB ACTIVISM

- **New NLRB Rules to Favor Unions**

- + Mandatory union rights poster
- + New rules on bargaining units
- + Expedited election processing
- + Mail and e-balloting

- **More Aggressive Remedies in “Nip in the Bud” Organizing Cases**

- + Injunctive relief (immediate reinstatement)
- + ULP postings read by Company officials
- + Union access to company bulletin boards and computer networks
- + Providing unions with employee names/addresses
- + Possible union access to an employer’s premises

CHANGE # 5 – NLRB INITIATIVE ON BARGAINING UNITS

✘ Hypothetical

✘ Your nursing home has a night shift with one nurse and a number of aides. Organizing starts. The nurse is involved in the organizing drive.

- Is the only nurse on duty a supervisor or an eligible voter?
- Can an employer fire her for being involved in the organizing?

CHANGE # 5 – NLRB INITIATIVE ON BARGAINING UNITS

- The law today
- The NLRB rulemaking initiative
- What can you do now in light of '11 changes?
 - Conduct a bargaining unit analysis
 - Look at the functions employees perform
 - Consider, to the extent appropriate and feasible, expanding borderline individuals' duties to meet the definition of a supervisor
 - E.g., does the person exercise independent judgment while assigning or responsibly directing other employees.?

CHANGE # 6 – NLRB INITIATIVE IMPACTING ON SOCIAL MEDIA POLICIES

✘ Hypothetical

✘ Supervisor Samantha learns that an employee (Eunice Union) is making disparaging remarks the Company and her on Facebook from her office computer. Samantha asks you to fire Eunice. Can you do so?

CHANGE # 6 – NLRB INITIATIVE IMPACTING ON SOCIAL MEDIA POLICIES

- The law today (protected concerted activity)
- The NLRB initiative regarding protected concerted activity
- What can you do now in light of '11 changes?
 - Review your company's electronic communication and other policies that might be impacted by the NLRB's initiative
 - Conduct management training on protected concerted activity

CHANGE # 7 – NLRB INITIATIVE IMPACTING ON 2011 MANAGEMENT TRAINING

✘ Hypothetical

✘ Your Company decides to hold focus group meetings for the first time. At one of the meetings, employees complain about wage-hour matters, including the administration of overtime. The person leading the meeting acknowledges the problem and assures attendees it is being addressed. You then learn from an employee that there is union organizing going on and that the union is encouraging employees to file a wage-hour collective action. Is it lawful to change the overtime program?

CHANGE # 7 – NLRB INITIATIVE IMPACTING ON 2011 MANAGEMENT TRAINING

- ✘ What can you do now in light of '11 changes?
 - Review policies and practices to insure legal compliance
 - Think about the timing and communication of policy/practice changes
 - Train front-line managers on:
 - Proper administration of EEO, wage-hour and other key policies
 - Proper administration of collective bargaining agreements (if applicable)
 - Legal and appropriate ways to handle protected concerted activity and/or union organizing

CHANGE # 8 – NLRB INITIATIVE IMPACTING ON PUBLIC ACCESS RULES

✘ Hypothetical

✘ One of your Company locations is being remodeled. Although many contractors were given the opportunity to bid on the job, the successful bidder is able to offer quality work at a lower cost. The contractor is using non-union subcontractors to keep costs in line. A carpenters union local is in front of the location with banners and handbills disparaging your company. What can you do?

CHANGE # 8 – NLRB INITIATIVE IMPACTING ON PUBLIC ACCESS RULES

- The law today (and the changes)
- What can you do now in light of ‘11 changes?
 - Identify your past practices – who do you give access to private property
 - Identify your property rights – leased v. owned space
 - Have a contingency plan for picketing/handbilling/demonstrations in place before you start renovating

CHANGE # 9 – NLRB INITIATIVE IMPACTING ON CONFIDENTIALITY RULES

✘Hypothetical

✘Your Company requires new hires to sign a confidentiality agreement prohibiting employees from discussing trade secrets, compensation, and other confidential or proprietary information with customers. An employee complains to a customer about her compensation, including disclosure of the amount she is being paid. The Company now wants to fire the employee. You have been asked for advice on the termination. What do you say?

CHANGE # 9 – NLRB INITIATIVE IMPACTING ON CONFIDENTIALITY RULES

- The law today
- What can you do now?
 - Review your confidentiality policies and agreements, taking into account NLRB decisions on the issue
 - Insure that your management team, including those who conduct orientation and review confidentiality breaches, are aware of NLRA considerations

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CHANGE # 10 – U.S. DEPARTMENT OF LABOR

- The law today (LMRDA and DOL interpretations)
- The DOL's Proposed LMRDA Rulemaking
 - Designed to Limit Two Important Reporting Exceptions
 - × On May 24, 2010, the DOL held a "stakeholder" meeting to discuss potential changes to:
 - (1) consultant/attorney reporting
 - (2) supervisory reporting
 - × Unions are obviously very supportive of these changes
 - × It is anticipated that new rules will be promulgated by DOL in 2011

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CHANGE # 10 – U.S. DEPARTMENT OF LABOR

- What can you do now in light of '11 changes?
 - + Work with lobbying groups to oppose DOL revision to LMRDA or to sponsor legislative amendments to the LMRDA to eliminate DOL tinkering with reporting requirements
 - + Participate in and/or monitor notice and comment opportunities for proposed rulemaking
 - + Conduct training now, before changes in the LMRDA take effect

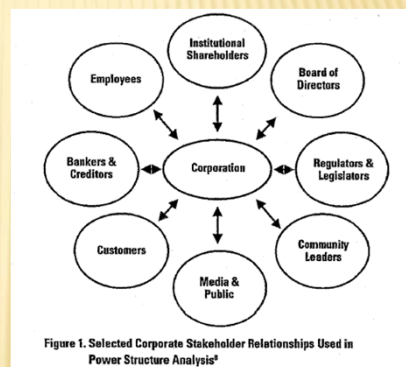
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CHANGE # 11 – CORPORATE CAMPAIGNS

- ✗ Where does the labor movement go from here?
- Union organizing through use of corporate campaigns and other approaches will continue
- Impact of NLRB decision on neutrality agreements and pre-recognition bargaining agreements
- Campaign donations
 - Putting money into politics
- Resolving internal battles
 - AFL-CIO and Change To Win
- Advance agenda through agency action/rulemaking
- Work at a state level



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WHAT YOU SHOULD BE DOING NOW: EMPLOYER STRATEGIES – AN OVERALL CHECKLIST

- **Strategic Plan Checklist**

- Has your organization taken steps to be viewed as an “employer of choice”? What is your reputation internally and externally?
- Have you reviewed whether your current labor relations approach is best for your organization in '11 and beyond? How has your company changed in the past few years? What is your plan for the future?
- Do you have an integrated, comprehensive labor relations plan?
- Do you have upper management and key stakeholder buy-in for your employment program?

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WHAT YOU SHOULD BE DOING NOW: EMPLOYER STRATEGIES – AN OVERALL CHECKLIST

- What steps have been taken to make your organization “issue-free” in '11? Are you contemplating a review or internal task force?
- Have you implemented “pro-active” and “best response” policies and practices?
- What is your ADR/dispute resolution program?
- In today's changed world, do you provide competitive wages and benefits?
- How are you addressing health care reform?
- Are you certain that you have lawful labor, employment, wage-hour, benefits and other workplace policies?
- Are you certain that your policies are properly administered by all levels of management?

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WHAT YOU SHOULD BE DOING NOW: EMPLOYER STRATEGIES – AN ACTION PLAN

- Develop a comprehensive labor relations plan
 - Think strategically
 - Get to know thought leaders and get them to know you
 - Get involved in the dialog about future changes (e.g., employer associations, lobbying)
 - Involve/inform your workforce
 - Conduct a vulnerability assessment
 - Internal and external
 - Lawful/effective policies and practices
 - How you are vulnerable to litigation, agency charges, union organizing, attacks to the Company's reputation, etc.

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WHAT YOU SHOULD BE DOING NOW: EMPLOYER STRATEGIES – AN ACTION PLAN

- Conduct a bargaining unit analysis to establish:
 - Preferred units in light of changes
 - Supervisory status
- Review your internal and external communications program
- Review your health care program
- Update employee handbooks/policies and union contracts
 - Including e-communications, confidentiality, access, no solicitation/distribution, etc.

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WHAT YOU SHOULD BE DOING NOW: EMPLOYER STRATEGIES

- Train your management team
 - Conduct new, focused training for legal, HR and management on labor and other workplace law developments
 - Consider a specially trained legal/HR/management team to respond quickly and lawfully to union activity
- Anticipate union corporate campaign approaches (media outreach, political involvement, neutrality requests, etc.) – whether you are unionized, union-free or somewhere in between
- Consider a “break the glass” kit to be ready for responding to union demonstrations, organizing or strike threats

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