

# What's New: A Federal & Wisconsin Review

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Milwaukee, Wisconsin

Thursday, November 8, 2018



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## Overview

- Labor Update
  - New Board/General Counsel
  - Employee Handbooks
  - Joint Employment
  - Work Rule Changes
  - Micro Unit Ruling
- Employment Update
  - EEOC Strategic Plan
  - Hiring Issues
  - Joint Employment
  - Harassment/Discrimination
  - OSHA
  - FMLA
  - Employee Non-Solicitation
  - FCRA



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## LABOR UPDATE



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### New NLRB

- John Ring (R)
  - Chair
  - Sworn in on April 16, 2018
  - Term ends Dec. 16, 2022
- Marvin Kaplan (R)
  - Sworn in on Aug. 10, 2017
  - Term ends Aug. 27, 2020
- William Emanuel (R)
  - Sworn in on Sept. 26, 2017
  - Term ends Aug. 27, 2021
- Lauren McFerran (D)
  - Sworn in on Dec. 17, 2014
  - Term ends Dec. 16, 2019'
- Mark Pearce (D)
  - Nominated for a third term
  - Awaiting Confirmation



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### New General Counsel

- Peter Robb
  - Sworn in on Nov. 17, 2017
  - Four year term
  - Former Director of Downs Rachlin Martin PLLC (Mgmt-Side Law Firm)



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### Board Agenda

- Memorandum GC 18-02 (Dec. 2017)
  - Identified intent to review and reconsider all cases over the last 8 years that overruled precedent and involved one or more dissents.
- Issues for review:
  - Use of Employer's Email System for Union Activity
  - Cases where NLRB expanded the definition of "concerted activity for mutual aid and protection."
  - Cases involving "obscene, vulgar, or other highly inappropriate conduct."



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## Board Agenda

- To be submitted to Advice:
  - Work stoppages on employer premises;
  - Circumstances in which employers may restrict access to employer property at times when employees are off duty;
  - Expansion of Weingarten rights in the context of employer-mandated drug testing;
  - Claims by unions that employers are successors by virtue of their hiring a predecessor's employees as required by local laws;
  - Circumstances in which a new employer will be found to be a "perfectly clear successor" and obligated to follow its predecessor's terms and conditions;
  - Whether an employer must disclose and produce witness statements prior to arbitrations; and
  - Whether employers will be required to continue to honor contractual dues check-off provisions after a collective bargaining agreement expires.



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## New Standard for Handbooks

- Boeing Co., 365 NLRB No. 154 (Dec. 2017)
  - No Camera Rule prohibited use of "camera-enabled devices" such as cell phones on ER property
  - Board implemented a new balancing test for determining whether workplace policy violated Section 7 – weighing ER's need for the rule against extent to which it interferes with Section 7 rights.



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## New Standard for Handbooks

- Boeing Co., 365 NLRB No. 154 (Dec. 2017), the Board also created 3 categories for analyzing rules:
  - Lawful because they do not prohibit or interfere with NLRA rights or the potential impact is outweighed by ER Justifications
    - Boeing no camera rule
    - Rules requiring -ees to abide by basic standards of civility
  - Individualized scrutiny of balance between ER need and employees' Section 7 rights
  - Unlawful because they expressly limit Section 7 rights
    - Rules prohibiting wage/benefit discussions



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## New Standard for Handbooks

- Board Guidance on Handbook Rules Post-Boeing (June 2018)
  - General Civility Rules (in Category 1):
    - Board held that these rules, when reasonably interpreted would not prohibit or interfere with Section 7 rights.
    - Examples of lawful rules include Prohibiting behavior that is rude, condescending or otherwise socially unacceptable • Disparaging the company's employees is prohibited • Rude, discourteous and unbusiness-like behavior is forbidden • Employees may not post any statements, photographs, videos or audio that reasonably could be viewed as disparaging to employees



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## New Standard for Handbooks

- Board Guidance on Handbook Rules Post-Boeing (June 2018)
  - Disruptive Behavior (Category 1)
    - While some rules may appear to apply to protected concerted activity, such as walk-outs, protests, or picketing, employees generally would not refrain from such activity merely because a rule bans disruptive conduct.



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## New Standard for Handbooks

- Board Guidance on Handbook Rules Post-Boeing (June 2018)
  - Use of Company Logos and Other Trademarked Materials (Category 1)
    - Examples of permissible rules, include:
      - Employees are forbidden from using the Company's logo for any reason.
      - Do not use any Company logo, trademark, or graphic without prior written approval.
    - However, rules regulating the use of the employer's name warrant individualized scrutiny.



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## New Standard for Handbooks

- Board Provides Guidance on Handbook Rules Post-Boeing (June 2018)
  - Workplace Confidentiality Rules (Category 2)
    - The NLRB considers confidentiality rules that cover employer business or employee information to be work rules that warrant individualized scrutiny in each case.
  - However, the NLRB considers rules related to confidentiality of wages, benefits, or working conditions to be unlawful (Category 3).



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## Joint Employer Rulings

- *Browning Ferris Industries* (Aug. 2015)
  - Board held that employers are joint employers if (1) they are both employers within the meaning of common law; and (2) they share or codetermine matters governing the essential terms and conditions of employment.
  - Concluded that joint employment can be found based on the right to control, whether or not that right was exercised (reserved control)
- *HyBrand*, 365 NLRB No. 156 (Dec. 2017)
  - Returned "direct and immediate control" standard for determining joint employment, which was in effect prior to *Browning-Ferris*
  - Employers are considered joint employers when there is they exercise actual, direct, and immediate control over essential employment terms
  - Potential or reserved control is not enough
  - Control must not be "limited and routine"



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## Joint Employer Rulings

- NLRB Order (Feb. 2018)
  - Voted 3-0 to vacate *Hy-Brand* standard because a potential conflict-of-interest of Member Emanuel that tainted the Board's 3-2 vote.
  - Reinstated *Browning Ferris* decision (right to control standard).
- Board Proposed Rule Change (Sept. 2018)
  - Published Notice of Proposed Rulemaking in Federal Register
  - Under proposal, employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.
  - Indirect influence and contractual reservations of authority no longer sufficient to establish a joint-employer relationship.
  - 11,448 comments received
  - On November 5, 2018, NLRB extended the time period to submit comments from the public by 30 days.



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## Work Rule Changes

- **Raytheon Network Centric Systems, 365 NLRB No. 161 (Dec. 2017)**
  - Unilateral change to employee healthcare benefits.
  - Board held that Raytheon was well within its rights to modify benefits because it had done so annually
- **Overturned E.I. du Pont de Nemours, 364 NLRB No. 113 (2016)**
  - Required employers to bargain with unions over changes to workplace rules, even where employers had made changes in past.
- Employers can again implement changes to work rules without bargaining with a union if the employer has a past practice of taking similar actions.
- Board stated that employer actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions, regardless of whether a CBA is in effect when past practice was created or no CBA existed with the disputed actions were taken.



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## Micro Unit Ruling Reversed

- **PCC Structurals, Inc. 365 NLRB No. 160 (Dec. 2017)**
  - **Overturned Specially Healthcare**
    - Required employers to establish that other employees who the employer believed should be included in a bargaining unit had an "overwhelming community of interest" with the petitioning unit
  - **Returned to the traditional community of interest standard**
    - Allows the Board to evaluate the interests of all employees – both those within and those outside the petitioned-for unit – without having to determine whether their community of interest is "overwhelming."
  - **Requires the Board to assess multiple factors to determine the appropriate unit, such as whether the employees:**
    - Are organized into a separate department;
    - Have distinct skills and training;
    - Have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
    - Are functionally integrated with the Employer's other employees;
    - Have frequent contact with other employees;
    - Interchange with other employees;
    - Have distinct terms and conditions of employment; and
    - Are separately supervised.



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## EMPLOYMENT UPDATE



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## EEOC Statistics

- **2017 Charge Statistics:**
  - 49% of all charges involved a retaliation claim (up from 2016).
  - 34% involved a race claim (down).
  - 32% involved a disability claim (up).
  - 30% involved a sex claim (up).
  - 22% involved an age claim (down).
- **Wisconsin Charge Statistics:**
  - Number of charges are down from 2016.
  - 40% involved retaliation (up).
  - 38% involved race (up).
  - 33% involved disability (up).
  - 24% involved sex (up).
  - 23% involved age (up).

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## EEOC Strategic Enforcement Plan

- **2017-2021 Plan:**
  - Recruitment and Hiring.
  - Temporary workers, staffing agencies, independent contractors.
  - Immigrant, migrant, and other vulnerable workers;
  - Gender-based pay discrimination.
  - Emerging Issues:
    - ADA qualification standards and leave policies;
    - Pregnancy-related limitations; and,
    - Protecting LGBT people from discrimination.
  - Systemic harassment.

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## Hiring Issues

- **Salary History**
  - Trend banning employers from asking job candidates about pay histories.
  - Effort to eliminate gender wage gap: 7 state bans, 8 local bans.
  - 2017 WI Assembly Bill 748 became 2017 Wisconsin Act 327 on April 16, 2018 - Prohibits local regulations regarding the right to solicit salary history information from prospective employees (Wis. Stat. s. 103.36). Leg. Council Memo: <https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act327.pdf>
- **Ban the Box Laws**
  - 33 states, District of Columbia, and over 150 cities have adopted ban-the-box or fair-chance policies. 11 states and 17 cities have adopted fair-chance laws for private employment
    - CA, CT, HI, IL, MA, MN, NJ, OR, RI, VT, WA

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## Hiring Issues

- **Negligent Hiring/Safe Workplace Requirements**
  - *Anicich v. Home Depot USA, Inc.*, 852 F.3d 643 (7th Cir. 2017):
    - Employers have duty to act reasonably in hiring, supervising and retaining employees.
    - Employer may be liable for breach of this duty under a negligent hiring/supervision theory.
  - Wisconsin Supreme Court recognized a claim for negligent hiring, training and supervision in *Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250, 267-68 (1998) which is typically considered to include negligent retention.
    - Duty, breach, cause-in-fact, and harm must be proven.



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## Joint Employment

- **Informal Guidance Letters withdrawn**
  - DOL withdrew its 2015 and 2016 informal guidance letters regarding independent contractors and joint employment.
  - DOL may take a more business-friendly approach in analyzing employer-employee relationships.
- **Many different tests (UI, ER, WC, IRS, etc.) but Seventh Circuit applies the economic realities test.**
  - Power to hire or fire;
  - Supervise or control work schedules or conditions;
  - Establish the rate and method of pay;
  - Maintain personnel records.
  - Circuit cautions that many unstated factors may be relevant on a case-to-case basis.



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## Harassment/Discrimination

- Law has not changed, but culture has.
- EEOC released "proposed enforcement guidance" addressing unlawful harassment.
- **Proposed Sexual Harassment Legislation:**
  - More than 100 bills or resolutions introduced in 2018.
  - Federal law prohibits tax deductibility of any settlement/payment re sexual harassment or abuse if subject to a nondisclosure agreement.
  - Limiting use of confidentiality agreements:
    - AZ HB2020 – signed April 25, 2018;
    - NY Senate Bill 57507C – signed April 2, 2018.
  - Prohibiting mandatory arbitration provisions related to harassment claims.



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### Harassment/Discrimination

- Under Title VII, and the WFEA, if the harasser is a supervisor and the hostile work environment includes an adverse employment action under Title VII, the employer will be vicariously liable for the harasser's conduct.
- Under federal law, an employer may avoid liability for co-worker harassment if the employer can demonstrate:
  - It took reasonable steps to prevent and promptly correct the harassment in the workplace, and
  - The aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures.

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### Harassment/Discrimination

- A sound and effective harassment policy is critical to an ER's prohibition of harassment in the workplace.
- Policy should contain in real-world language:
  - Prohibition of harassment;
  - Definition of harassment;
  - Complaint and investigation procedure;
  - Commitment to take prompt, remedial action;
  - Prohibition against retaliation;
  - Confidentiality; and
  - Signed acknowledgment.

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### Harassment/Discrimination

- Maintaining a policy is not enough! You must also ACT on it by training and actively monitoring and investigating complaints about which the ER knows or should know.
- A thorough, documented investigation plays a critical role in deterring further and/or future harassment and defending against claims.
- Improving compliance here makes an employer more competitive.

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### Sex Discrimination

- Sexual orientation discrimination is sex discrimination in Seventh (Wisconsin, Illinois, Indiana) and Second (New York, Vermont, Connecticut) Circuit Courts.
  - *Hively v. Ivy Tech Comm. College*, 853 F.3d 339(7th Cir. 2017).
  - *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).
- Will likely see this area of law continue to expand. WFEA has protection for sexual orientation but not transgender.
- *Evans v. Georgia Regional Hospital*, 850 F.3d 1238 (11th Cir. 2017), cert. denied:
  - Evans alleged discrimination based on sexual orientation and gender nonconformity, which the District Court dismissed.
  - Eleventh Circuit reversed regarding the gender-conformity claim; however, affirmed dismissal of the sexual-orientation claim.
  - Evans petitioned for review, relying on the Seventh Circuit *Hively* decision.
  - December 11, 2017, SCOTUS denied petition leaving the Circuits split for future resolution or action by Congress.

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### Disability Discrimination

- *Wisconsin Bell, Inc. v. LIRC*, 2018 WI 76:
  - Phone company terminated employee for violating work rules after employee was put on and violated the terms of his last chance agreement.
  - Wis. Court of Appeals held that Company's decision to fire employee amounted to disability discrimination.
  - WI Supreme Court reversed and held that an employer does not engage in intentional discrimination when it bases an adverse employment action on employee's conduct unless the employee proves the employer knew his disability caused his conduct.
  - Answers the question left open by *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, ¶ 28, where LIRC held that "a firing for misconduct equates to a firing because of the underlying causal disability."

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### Disability Discrimination

- *Painter v. Illinois Department of Transportation* (7th Cir. 2017):
  - Employee snapped and screamed at co-workers, constantly mumbled to herself, banged desk drawers, and was confrontational and argumentative. Illinois DOT asked employee to undergo a fitness-for-duty exam. Employee found to be unfit for duty because of "paranoid thinking and highly disruptive behavior which result[ed] from her paranoia."
  - Seventh Circuit held that an employer can require an employee to undergo a mental health examination when it has a reasonable belief based on objective evidence that a medical condition impairs an employee's ability to perform essential job duties or that the employee poses a threat due to a medical condition.
    - Is there genuine doubt employee can perform job-related functions?
    - Is there a reasonable concern for safety?
    - Is FFD job-related and consistent with business necessity?

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## ADA Accommodation

- **Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017) cert. denied:**
  - Held that former employer did not violate the ADA by refusing a multi-month leave of absence.
  - ADA is not a leave entitlement law (that is FMLA).
  - While a brief period of leave is reasonable, a "multi-month" leave of absence is unreasonable under the ADA.
  - Keep in mind that this is inconsistent with EEOC's position and has not been squared with WFEA.



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## OSHA

- **OSHA Memorandum (Oct 2018)**
  - Clarifies its position on incentive programs and drug testing to ensure that incentives do not negatively impact reporting.
  - OSHA will take a more practical approach to incentive programs and drug testing.
    - Traditional incentive programs based on a lack of injuries during a particular time period will not be deemed to violate OSHA if there are measures in place to ensure employees report injuries despite the program.
    - Drug testing allowed:
      - Random
      - Periodic
      - Testing pursuant to state's worker compensation laws
      - Testing pursuant to federal law
      - Post-injury or "near miss" testing.



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## FMLA

- **New Forms (Sept 2018)**
  - DOL published updated FMLA forms to be used due to federal regulatory requirements. Use forms with "Expires: 8/31/2021" in upper right hand corner.
- **DOL Issues FMLA Advisory Opinion Letters (Aug 2018)**
  - Organ Donors: organ-donation surgery can qualify as a "serious health condition" under the FMLA, thus entitling an employee to up to 12 weeks of protected leave. Likewise, effective July 1, 2016, Wisconsin requires private employers to provide leave for employees who are bone marrow or organ donors.



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## FMLA

- DOL Issues FMLA Advisory Opinion Letters (Aug 2018)
  - No-Fault Attendance Policies
    - Policy provided that employees would accrue points for tardiness and absences except for certain absences, including FMLA-protected leave. Points remained on employee's record for 12 months and the employer would extend that period for any time the employee was not in "active service."
    - DOL concluded that "freezing" an employee's attendance points while on FMLA leave did not violate the FMLA by denying a benefit to employees who took FMLA leave.
    - FMLA does not entitle an employee to superior benefits.

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## Class Action Waivers

- Epic Systems Corp. v. Lewis, 548 U.S. \_\_\_\_ (2018)
  - Supreme Court upheld the validity of class action waivers in arbitration agreements.
  - Congress has instructed in the Federal Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced according to their terms.
  - Nothing in the National Labor Relations Act was intended to negate the FAA or suggest otherwise.
  - Class and collective action waivers are useful tools used to preserve confidentiality, resolve claims more quickly, efficiently and cost-effectively, and limit potential exposure to collective action lawsuits.

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## Employee Non-Solicitation

- Manitoowoc Co. v. Lanning, 2018 WI 6:
  - Employee non-solicitation restrictions are governed by Wis. Stat. s. 103.465
  - To be enforceable, it must be reasonable and narrowly tailored to protect a legitimate interest of the Company.
  - Court found that Manitoowoc's provision was overbroad.
    - It prevented employee from encouraging ANY of the Company 11,000 employee to terminate his/her employment with the Company for ANY reason.
    - Should be narrowly tailored, for example, based on the employees with whom the employee had contact during the last 12 months of employment.

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## Fair Credit Reporting Act

- **May 2018 - Economic Growth, Regulatory Relief, and Consumer Protection Act.**
  - Response to big data breaches requires nationwide consumer protection agencies to provide free "national security freezes."
  - Pre-hire background checks compliance requires notice to the applicant if you are going to take an adverse action based on the background check, along with a Summary of Your Rights Under the Fair Credit Reporting Act.
- **Consumer Financial Protection Bureau (CFPB) changed that Summary form which should be in place and used by employers. Form can be found at:**
  - [https://files.consumerfinance.gov/f/documents/bcfc\\_consumer-rights-summary\\_2018-09.docx](https://files.consumerfinance.gov/f/documents/bcfc_consumer-rights-summary_2018-09.docx)



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## QUESTIONS?

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