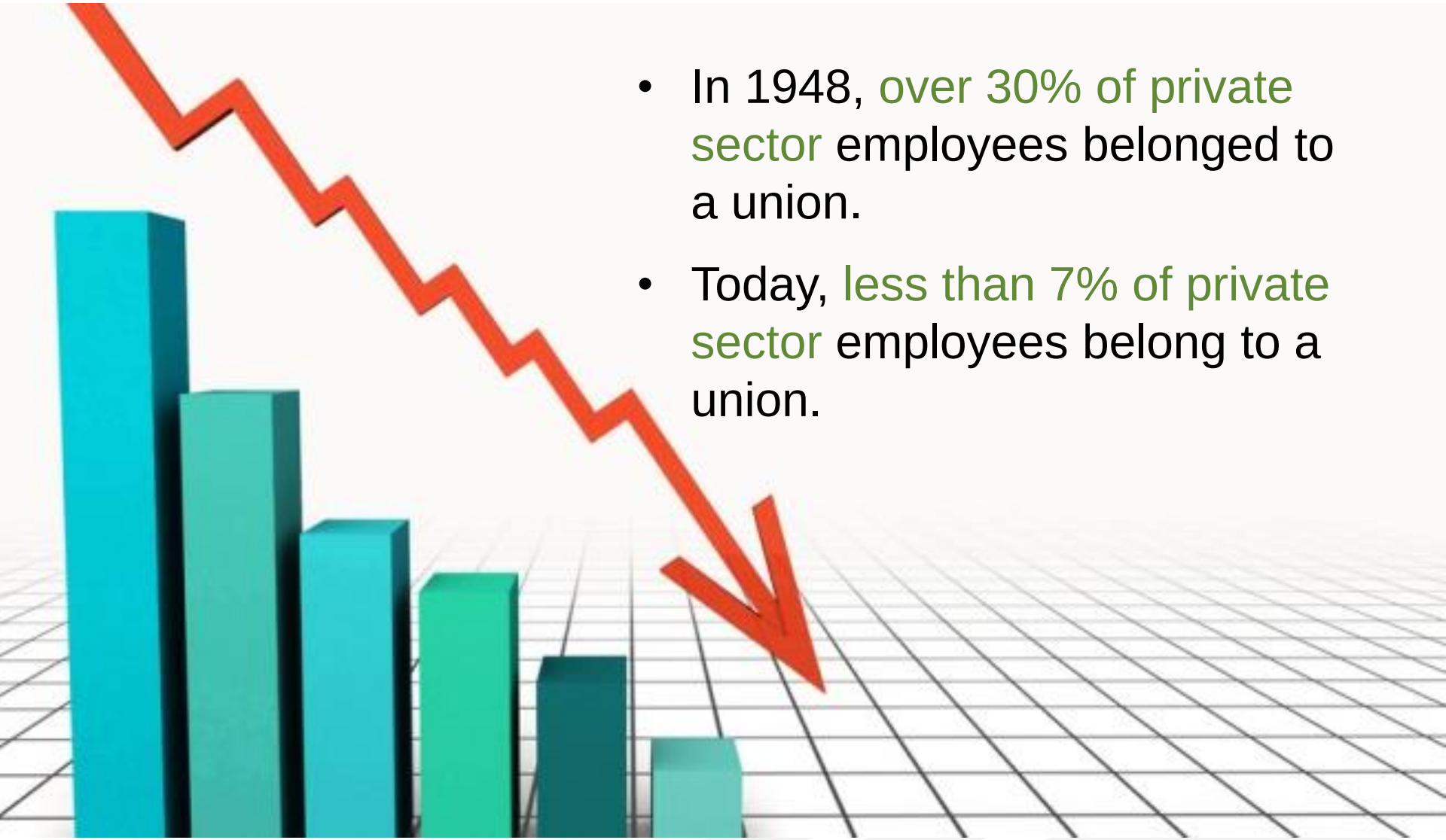

Bristol Bay
NATIVE CORPORATION
OPERATING WITH INTEGRITY
COMMITMENT COMPLIANCE CULTURE
BBNC 2016
Annual Compliance Conference
Presented by Eduardo F. “Jim” Cuaderes

NLRB Update and Employment Law Trends

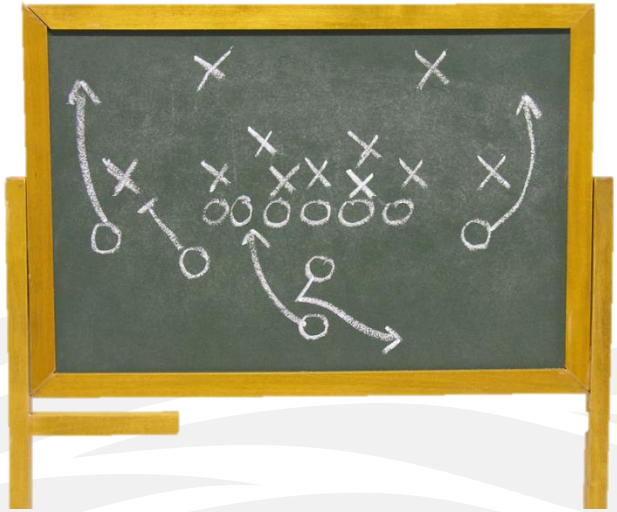
Union Population is Shrinking



- In 1948, over 30% of private sector employees belonged to a union.
- Today, less than 7% of private sector employees belong to a union.

How is the NLRB responding?

- Increase awareness of the right to organize.
- Change the rules: Make it easier and faster for unions to organize.
- Go after non-union employers' policies.
- Reversing Board precedent.



NLRB

- Three Member Board
  - Mark Pearce (D) Chairman
  - Philip Miscimarra (R)
  - Lauren McFerran (D)

- Recent issues in the headlines:
  - Quickie elections
  - Expanded definition of joint employer
  - Multi-employer units becoming easier to organize
  - Electronic signatures on union authorization “cards”
  - Potential captive audience meeting rights for unions
  - **Expansion of Protected Concerted Activity**
  - **Class action waivers in arbitration agreements**

The Expansion of Protected, Concerted Activity

The NLRB has become the de facto employment police

You don’t have to have a union work force to be subject to the NLRA!

Section 7 of the NLRA

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and . . . *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities.

What is “Protected Activity” Under the NLRA?

- Employees have a statutory right to:
  - Take action to improve working conditions
  - Discuss dissatisfaction with working conditions with one another
  - Discuss **wage rates**, bonuses, and benefits with one another
  - Complain about favoritism, policies, or other terms and conditions of employment
  - **Criticize management’s** actions affecting their conditions of employment
  - Enlist outside support

- *Banner Health*, 362 NLRB No. 137 (2015)
  - Blanket confidentiality instructions during internal investigations considered unlawful, or policies to that effect, are unlawful
  - Employees have a Section 7 right to discuss investigations
  - Must be case-by-case and particularized showing of harm if matter is discussed, employer's burden to show its concerns outweigh employee rights
  - "recommendation" of confidentiality treated no differently than a mandate

- Overturns NLRB's decision in *Register-Guard*
  - During non-work time, employers must open their corporate email systems to employee union organizing and group discussions among employees about terms and conditions of employment
  - Applies to all employers, not just unionized employers
  - Employees have statutory right to use corporate email for Section 7 purposes
  - Employers can no longer ban employees' non-business use of email system

Purple Communications, 361 NLRB No. 126 (2014)

- Employers not required to open their corporate e-mail to union organizers/unions and other non-employees
  - However, ruling restricts the employers' ability to restrict employees from exchanging emails with such non-employees
- Employers not required to give employees access who do not use corporate e-mail to do their jobs
- Most employers that ban all nonbusiness use of corporate e-mail will be required to rescind that policy
  - total ban on nonbusiness use will require the employer to demonstrate "special circumstances" that "make the ban necessary to maintain production or discipline"
  - "will be the rare case" employer would be required to make a particularized showing and not rely on a theoretical risk

- *Design Technology Group, LLC* (2013)
  - Employees complained to management about working late in an unsafe neighborhood and issue was never resolved – took to Facebook
  - “It’s pretty obvious that my manager is as immature as a person can be . . . NOTHING GETS DONE!” Another employee agreed
  - BOTH were fired. NLRB found this “classic concerted protected activity” and ordered reinstatement with back pay

- *Three D, LLC v. NLRB* (2d Cir. 2015)
  - Ex employee posted on Facebook re: bar owner’s fault he owed taxes… “wtf!!!!”
  - Current employee one “liked” the post.
  - Current employee two commented, “I owe too, such an asshole”
  - Current employees fired
  - Board and court found the “like” and the comment were PCA

- ALJ holds Chipotle’s social media code of conduct requiring employee to delete Twitter Tweets that were critical of certain employment conditions and practices unlawful.
- Protected Tweet: Employee replied to a post by a customer who tweeted, "Free chipotle is the best thanks." Employee tweeted, "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?"

- *Pier Sixty*, 362 NLRB No. 59 (2015):
  - Employee used phone (while on break) to post: “Bob [supervisor] is such a nasty M***** F***** don’t know how to talk to people!!!!!! F*** his mother and his entire f****** family. What a LOSER!!!! Vote YES for the UNION!!!!!!!
  - Employee fired
  - NLRB ordered reinstatement with back pay

- **"Sandwich Test" Posters:** side-by-side photos of identical Jimmy John's sandwiches; one labeled prepared by a "healthy" worker and the other labeled made by a "sick" worker.
- The poster read: Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick. We hope your immune system is ready because you're about to take the sandwich test ... Help Jimmy John's workers win sick days.

- 8th Cir. Held: Employees have right to make derogatory public statements about an employer's products or services, provided only that the statements:
  - have some connection to a dispute concerning wages, hours or working conditions;
  - have some element of truth; and
  - are not intentionally malicious

(MikLin Enterprises Inc. v. NLRB)

- Confidentiality
- Employee (mis)conduct, including
  - Loyalty and “courteous behavior”
- Photos & videos
- Social media and internet use
- Media contact
- Complaint/dispute resolution policies

The challenge:

- Most companies must limit disclosure of some information to maintain competitive advantage, protect privacy, and safeguard trade secrets
- But, the NLRA prohibits employers from preventing employee discussions of the terms and conditions of employment
- How to thread the needle?

- PEC of Connecticut.: Policy prohibited “posting information … in any manner that may **adversely affect** company business interests or reputation”
- EchoStar Technologies., LLC: “You may not make **disparaging or defamatory** comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their products/services”
- Lily Transportation Co.: No “**disparaging, negative, false, or misleading** information or comments involving Lily or Lily’s employees and associates on the internet…”

- Rules prohibiting use of cameras, camera phones and other recording equipment on property without permission, unlawful. (*Rio All Suites*, 362 NLRB No. 190).
- The NLRB's concerns include protecting documentation of:
  - Terms and conditions of employment, *e.g.*, unsafe conditions
  - Organizing activities, *e.g.*, picketing

- Nevertheless, the NLRB has found such prohibitions acceptable when tailored to protect a legitimate interest, such as:
  - Privacy
    - **Flagstaff Medical Center:** NLRB approved a hospital policy prohibiting the "*use of cameras for recording images of patients and/or hospital equipment, property, or facilities.*"
  - Trade secrets/ confidential information
    - The prohibition should be narrowly targeted to the confidential information, *e.g.*, to the specific spaces where confidential information is kept.

Flagstaff Medical Center, Inc., 357 NLRB No. 65 (2011)

1. The NLRA is in tension, if not in conflict, with many key employer objectives
    - Balancing these objectives with the NLRA requires precise word choice
2. Avoid blanket prohibitions on employee communications
    - For example, “gossip is not tolerated”
3. Identify precisely what the employer wishes to prohibit
    - Not “inappropriate conduct”, but harassment based on protected characteristics, obscenity, etc.
    - Not photos of the workplace, but photos of confidential material

BUT, things are likely to change!

With the results of the election, a Trump Administration is likely to appoint an employer-friendly Board, and most everyone is predicting that the policies of the current union-friendly board will be rescinded.

Arbitration Agreements and Class Action Waivers

Supreme Court holds that class action waivers are generally enforceable in arbitration agreements.

- *AT&T Mobility LLC v. Conception* (2011)
- *American Express v. Italian Colors Restaurant* (2013)

But, the NLRB says class action waivers are illegal because they prevent protected concerted activity. Some courts have pushed back.

- *Murphy Oil* (reversed by the Fifth Circuit)
- *Raymours Furniture* (reversed by the Second Circuit)
- *Cellular Sales of Missouri* (reversed by the Eighth Circuit)

versus

- *Epic Systems* (affirmed by the Seventh Circuit)
- *Ernst & Young* (affirmed by the Ninth Circuit)

This clash between the NLRB and the Courts has set up a battle to be decided by the Supreme Court likely sometime in 2017

- The NLRB has filed a cert. petition in Murphy Oil and Raymours Furniture
- Lawyers for Epic Systems and Ernst & Young have filed cert. petitions.
- The U.S. Supreme Court will almost certainly take up this issue.
- Caveat: Will the Supreme Court have a full complement of 9 justices by the time it hears these cases?

Employment Law Trends

The EEOC and other agencies are expanding definitions found in old laws

Example: definition of “sex” is being expanded in federal regulations to include:

- Sexual orientation
- Expectations of gender norms
- Protection of transgender identity, i.e. bathroom access laws and regulations and sexual reassignment surgery costs as benefits under employer group health plans

Federal Laws are being expanded by Executive Orders and agency regulations

Examples:

- DOL has raised the salary basis test under the FLSA for exempt employees nearly 40%. It goes into effect December 1, 2016; $455 to $913 per week. And the salary threshold is indexed to inflation, which means automatic salary increases without new rule making.
- Federal Contractors must pay higher minimum wage.
- EEO-1 reports are required to show pay data information starting with 2017 reports
- OSHA will start posting employer injury and illness reports on line
- OSHA has promulgated a rule that makes mandatory post-injury drug testing subject to its anti-retaliation rules

New Laws are being pushed on the state level

- Paid sick and maternity leave laws are expanding
- Minimum wage thresholds are expanding at the state and local levels
- New laws allowing recreational use of marijuana are being passed
- LGBTQ rights are expanding at the state and local level
- Whistle blower protections are expanding

Litigation Trends

Examples:

- FLSA class actions are up; they never seem to end.
- Title VII and state law discrimination class actions are on the rise, although they are more regional in nature.
- Equal pay claims are on the rise and getting emphasis from the EEOC.
- Disability boundaries are being expanded (i.e. whether obesity is a disability)

BUT, there is a new sheriff in town!

A Trump Administration is likely to rescind Obama-era executive orders and appoint employer-friendly administrators in key government posts as well as nominate a Supreme Court justice and other judges that may not go along with the progressive nature of the trends just described.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