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Hot Topics in Labor & Employment Law

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Presenter Backgrounds

- Kathleen Kubis, Katherine Smallwood, and Shola Omojokun are labor and employment associates at Seyfarth Shaw LLP.

- Seyfarth has 13 offices around the world and more than 850 attorneys. The firm's labor and employment practice group was recently named the Labor & Employment Team of the Year at the 10th Annual Chambers USA Awards for Excellence.

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Recent Supreme Court Decisions

- *Young v. UPS*
  - ✓ Pregnancy Discrimination

- *EEOC v. Abercrombie & Fitch*
  - ✓ Religious Discrimination

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Title VII of the Civil Rights Act of 1964

- Employers with 15 or more employees
- It is unlawful for an employer to:
  - ✓ fail or refuse to hire,
  - ✓ discharge,
  - ✓ or to discriminate with respect to compensation, terms, conditions, or privileges of employment
  - ✓ because of an individual's race, color, **religion**, **sex**, or national origin

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The Pregnancy Discrimination Act (PDA)

- Added the following to Title VII:
  - ✓ Prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions"
  - ✓ **Employers must treat "women affected by pregnancy…the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work…"**

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Young v. UPS - Background

- Part-time UPS driver with a pregnancy-related lifting restriction wanted light duty
- UPS provided light duty for employees who were injured on the job, had disabilities covered by the ADA, or had lost DOT certifications
- Young argued that she was entitled to the same accommodations based on her pregnancy
- District Court ruled in favor of UPS
- Fourth Circuit agreed, ruled UPS did not violate the PDA

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Young v. UPS – Supreme Court Decision

- ✓ **Issue**: Was UPS obligated to accommodate a pregnant employee who required a lifting restriction when it provided such a restriction in other circumstances?
- ✓ **Holding**: Probably yes. While the Court did not answer this question directly, it provided a framework for pregnant employees challenging workplace accommodation policies and practices.
- ✓ The Supreme Court remanded to the Fourth Circuit
- ✓ Parties settled the case in October 2015

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Recent EEOC Activity

- Issued new guidance in July 2014 in response to litigation
- But, the Supreme Court did not rely on EEOC guidance
- EEOC updated its guidance in June 2015 in response to the *Young* decision
- Pregnancy discrimination has been identified as a strategic enforcement priority
- Recent EEOC pregnancy discrimination litigation
  - ✓ Filed 44 pregnancy-related lawsuits since 2011
    - 14 lawsuits in 2014, which was 18.4% of all Title VII lawsuits
    - Has recovered approximately $4.4 million
    - Involved workers in all segments of the workforce

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Impact on Employers

- More pregnancy-related impairments now likely rise to the level of an ADA-covered disability
- Review and update policies
  - ✓ Adopt practices that consider accommodation of pregnant employees, even if the pregnancy is without complications.
  - ✓ Adopt policies and practices consistent with state and municipality pregnancy accommodation laws
- Train managers and employees on the law and policies
  - ✓ Advise them to direct concerns to Human Resources

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EEOC v. Abercrombie – Background

- Teenager Samantha Elauf applied for a sales floor position at an Abercrombie & Fitch store
- Elauf is a practicing Muslim and wore a headscarf to the interview
- No mention of the headscarf or religion
- Interviewer assumed she was Muslim and wore it for religious reasons
- Elauf did well in the interview, and was deemed qualified for hire
- But, Abercrombie had a “Look Policy” that prohibited caps
- Determined headscarf would violate the Look Policy, so did not hire her
- District Court ruled in favor of the EEOC
- Tenth Circuit reversed and ruled in favor of Abercrombie

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EEOC v. Abercrombie – Supreme Court Decision

- ✓ **Issue**: Does the prohibition against refusal to hire to avoid accommodating a religious practice apply only if the applicant informs the employer of his or her need for a religions accommodation?
- ✓ **Holding**: No. The prohibition applies if the applicant can show that the need for an accommodation was a *motivating factor* in the decision not to hire, not that the employee actually requested the modification. Employer does not need to have "actual knowledge."
- ✓ Bottom line: an employer may not make an applicant's religious practice – confirmed or otherwise – a factor in employment decisions.

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Impact on Employers

- Update training for hiring managers and interviewers
- Do not ask about religion or make assumptions based on stereotypes
- Make work rules clear to applicants
- Consider engaging in the interactive process, if warranted
- Set the right tone
- Consider consulting counsel

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Genetic Information Nondiscrimination Act of 2008 (GINA)

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GINA - What is it?

- GINA prohibits employers from requesting, requiring, or purchasing the genetic information of an employee.
- Employers are also prohibited from using genetic information to discriminate against employees, or to make employment decisions, including hiring, firing, and promotion decisions.

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GINA - What is it?

- Genetic information means information about:
  - ✓ (i) an employee's genetic tests;
  - ✓ (ii) the genetic tests of family members of the employee; and
  - ✓ (iii) the manifestation of a disease or disorder in family members of the employee.
- There are six narrow exceptions to the rules established by GINA. One exception relates to employer wellness programs.

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GINA – Recent Developments

➢ The Devious Defecator Case

- ✓ In June 2015, a case nicknamed the “mystery of the devious defecator,” became the first case brought under GINA to go to trial.
- ✓ As a result of the case, Atlas Logistics Group Retail Services, a grocery distributor in Atlanta, Georgia, became the first private company to face penalties under GINA since the law was enacted.
- ✓ The case stemmed from the collection of genetic information from two warehouse employees who worked for Atlas. The Company collected the information to determine who was leaving piles of feces around the facility.
- ✓ The two workers sued the company in 2013, and on June 22, 2015, a jury awarded **$2.25 million** to the plaintiffs.

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GINA – Recent Developments

➢ Proposed Changes to Wellness Program Rules

- ✓ On October 30, 2015, the EEOC released a proposed rule concerning the application of GINA to employer wellness programs.
- ✓ The proposed rule would allow employers to offer limited inducements (financial or in-kind and in the form of rewards or penalties) to obtain information from the *spouses* of employees covered by the employer's group medical plan regarding the spouses' current or past health status, through a medical questionnaire or examination.
- ✓ An EEOC post on questions and answers can be found here: http://www.eeoc.gov/laws/regulations/qanda-gina-wellness.cfm
- ✓ Members of the public have until **Tuesday, December 29, 2015** to provide comments on the proposed rule.
- ✓ The text of the rule is available at https://federalregister.gov/a/2015-27734

GINA – Practical Guidance

- While employers are not currently required to comply with the proposed rule on wellness programs, employers that offer wellness programs should analyze whether the proposed rule will require future changes to those wellness programs to avoid any future surprises.
- Ensure written policies prohibit unlawful discrimination on the basis of genetic information.
- Train managers and supervisors on the relevant written policies and train them not to request, use, or share any type of genetic information.

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Independent Contractors

Independent Contractors

- On July 15, 2015, the Department of Labor's Wage and Hour Division issued guidance on the difference between employees and independent contractors that, if accepted by the courts, would make it easier for a worker to prove that the business to which he provides services is actually his employer.
- The text of the guidance can be found here: http://www.wagehourlitigation.com/files/2015/07/AI-2015_1.pdf

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Independent Contractors

- The independent contractor guidance supports the continued use of the following six-factor "economic realities test" but changes the emphasis put on various factors:
  - ✓ The extent to which the work performed is integral to the employer's business;
  - ✓ Whether the worker's managerial skills affect his/her opportunity for profit and loss;
  - ✓ The relative investments in facilities/equipment by worker and the employer;
  - ✓ The worker's skill and initiative;
  - ✓ The permanency of the worker's relationship with the employer; and
  - ✓ The nature and degree of control exercised by the employer.

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Independent Contractors

- The new guidance on independent contractors…
  - ✓ emphasizes the extent to which the services at issue are integrated into the business of the entity receiving them;
  - ✓ emphasizes whether the service provider has an opportunity for financial loss;
  - ✓ emphasizes the service provider's financial investment and dismisses an investment of $35,000 to $40,000 as inconsequential;
  - ✓ emphasizes the importance of the service provider's business skill and judgment as opposed to his technical skills;
  - ✓ de-emphasizes whether the business has control over the service provider.

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Independent Contractors

- "Most workers are employees under the [Fair Labor Standards Act]"
- Targets include organizations and companies benefitting from services by non-employees, including:

✓ Home health care	✓ Catering services	✓ Child care
✓ Repair/Maintenance	✓ Staffing agencies	✓ Janitorial services
✓ Construction	✓ Transportation	✓ Security

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- The new guidance is an agency interpretation, and is not subject to the notice and comment process required for rulemaking.
- The extent to which courts should defer to the agency interpretation, if at all, is likely to be the subject of litigation.
- The agency interpretation does not have the force of a new regulation issued after notice and comment. The agency interpretation does not announce a new test; rather, it sets forth the department's view on how to interpret the current test.

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Independent Contractors

- Any organization that uses independent contractors to receive services should review the agency interpretation and consider carefully how the Department of Labor and the courts applying the economic realities test would view its independent contractor relationships.
- A business that misclassifies an individual as an independent contractor may face exposure under the Fair Labor Standards Act (FLSA), including liability for any failure to pay at least the minimum wage for all time worked, failure to pay overtime for work in excess of 40 hours per week, violations of other statutes that borrow the FLSA's definition of "employee," and violation of the FLSA's recordkeeping requirements.

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Evaluating Joint Employment Risks Post *Browning-Ferris*

The National Labor Relations Board's Former Test for Joint Employers:

- To support a joint-employer finding, the employer must possess **sufficient indicia of control** over the petitioned-for employees.
  - This typically meant that the employer must have exercised "**direct and immediate**" control over employment matters.
- Requires the employer to **meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.**

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The *Browning-Ferris* Decision:

- On August 27, 2015, the National Labor Relations Board (NLRB) greatly expanded the scope of entities that may be considered “joint employers” bound by the National Labor Relations Act (NLRA).
- The question before the NLRB was whether Browning-Ferris Industries (BFI), a waste management company, was a joint employer with its staffing agency, Leadpoint, in a union representation election covering Leadpoint's employees.
- In a 3 to 2 decision along party lines, the NLRB majority found that BFI was a joint employer with Leadpoint.
- The NLRB no longer requires that a joint employer:
  - Possess and exercise actual control over key terms and conditions of employment.
  - Exercise such control directly and immediately. Control exercised indirectly is sufficient.

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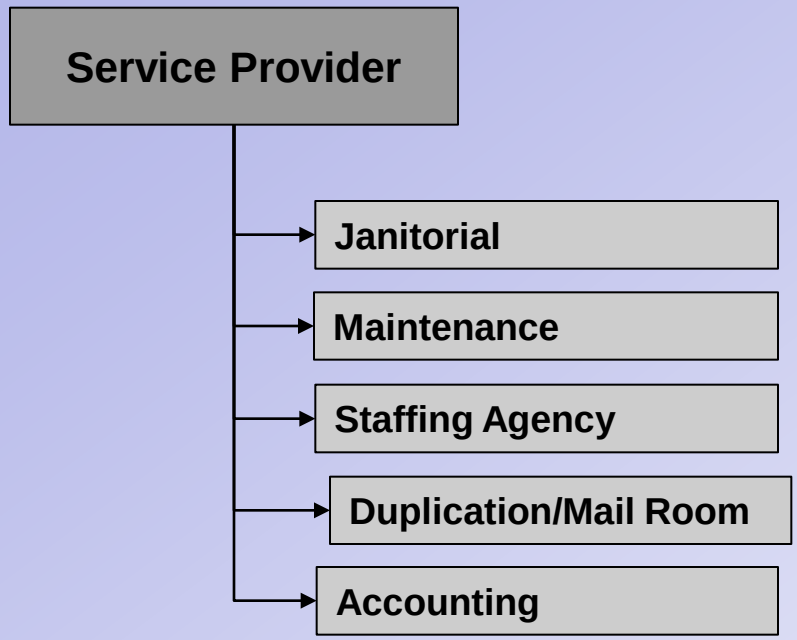
The Potential Impact of *Browning-Ferris* on Other Agencies:

- *Browning-Ferris* does not govern joint-employer determinations under statutes other than the NLRA, but it is part of a larger trend to expend joint-employer status under various employment laws.
- Joint-employer determinations will impact, not only businesses in the traditional economy but will also affect companies in the rapidly growing contingent and on-demand sector.
- Such federal agencies include:
  - DOL/WHD – wage and hour
  - EEOC – discrimination statutes
  - DOL/OSHA – employee safety
  - DOL/EBSA – employee benefits
  - DOL/OFCCP – federal contracts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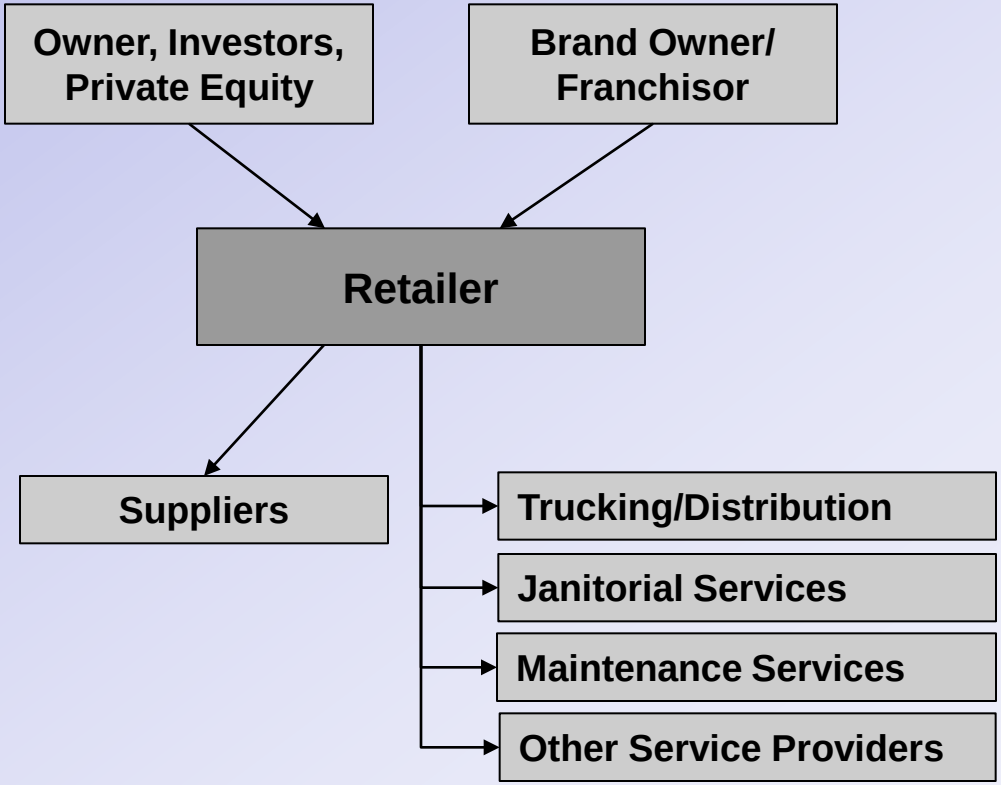
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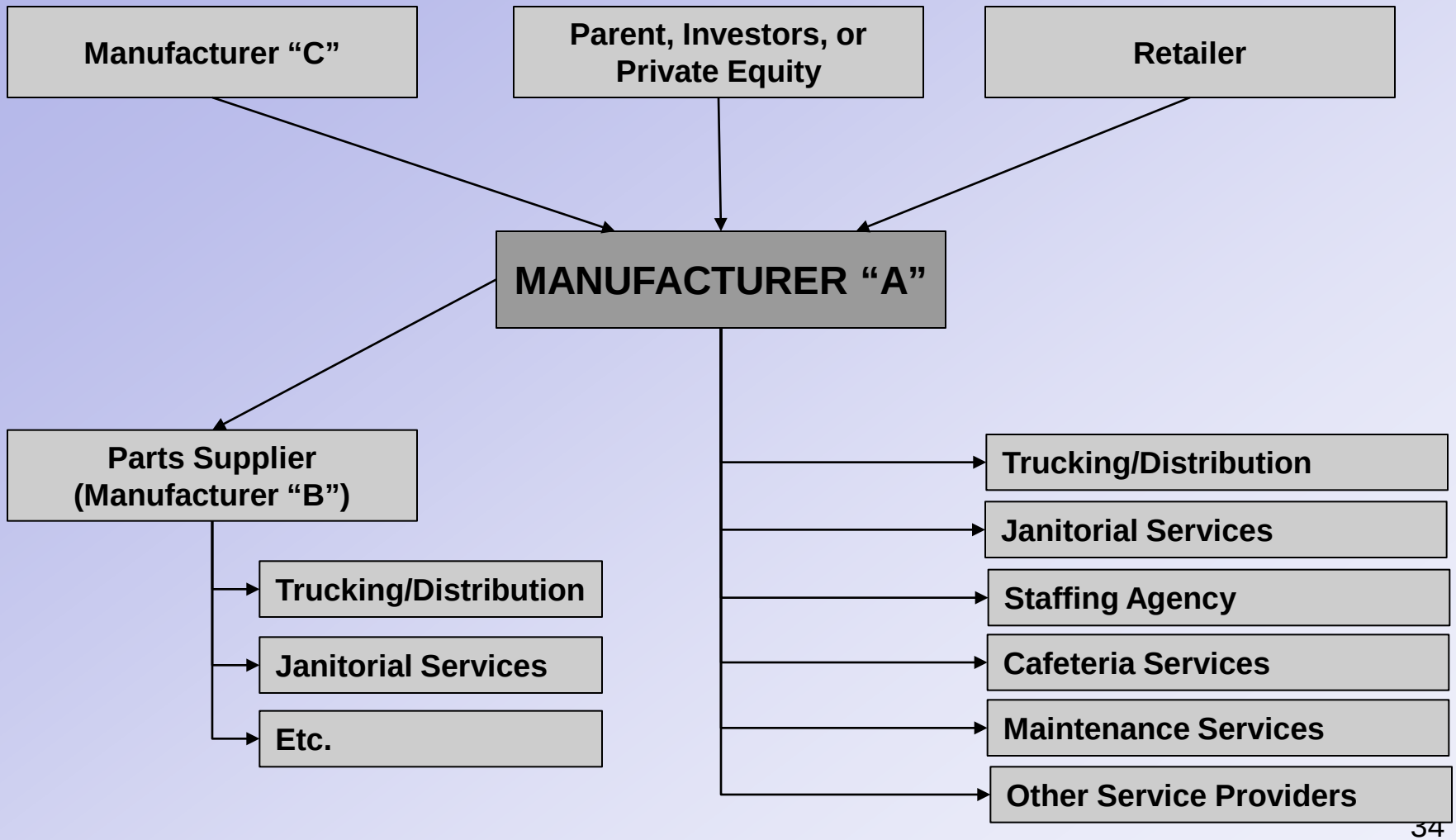
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Trucking/Distribution
Janitorial Services
Staffing Agency
Cafeteria Services
Maintenance Services
Other Service Providers

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Proactive Steps to Avoid Joint Employer Liability:

- Currently navigating in the dark; fact-specific and no bright line test.
- Each situation is unique; thoughtful analysis required.
    1. Consider *all* business relationships;
        - This includes your business partners' business partners.
    2. Assess direct, "indirect," and "potential" control;
    3. Assess influence (whether exercised or not) over third-party employees' "essential" terms of employment;
    4. Review contracts carefully for reserved rights and indemnification language;
    5. Address the ends, not the means; and
    6. *Train* your managers and supervisors.

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Social Media And The Law

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Issues Arise When Social Media Is Used . . .

- By ***employer*** in making hiring decisions.
- By ***employer*** when conducting internal investigations.
- By **employee** when talking about work or disclosing work-related information.
  - ✓ Concerns include:
    - employer's potential liability for employee statements
      - (*e.g.*, threats of violence, harassment or discrimination)
    - criticism or defamation of employer
    - employee's freedom of speech
    - employee's NLRA rights
    - employee's right to privacy while off-duty
    - employee's violations of company policies
    - employee's disclosure of trade secrets and confidential information

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Social Media Policies And The NLRA:

- Employers must consider Section 7 of the National Labor Relations Act, which protects employees' rights to engage in "*protected concerted activity*" – *besides protecting Company trade secrets, probably the most critical current area of concern.*

- Applies to both unionized and non-unionized employees: *in short, to **every** employer.*

- ***Beware of overly broad restrictions on employee communications:***
  - Cannot have a policy forbidding discussion of wages or working conditions among employees
  - Cannot have a policy forbidding "unprofessional" or "inappropriate" communications
  - Cannot simply prohibit "disparaging" comments about the employer

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Protected Activity & Social Media:

- An employee is protected under the NLRA when engaging in a discussion of work conditions with other coworkers on social media.
  - ✓ Sharing information about wages
  - ✓ Complaining about policies or managers
  - ✓ Displaying union-related insignias/logos
  - ✓ Expressing union support
  - ✓ Attempting to organize a union
  - ✓ Otherwise discussing employment terms
- Examples include:
  - ✓ Facebook post with comments/“likes”
  - ✓ Twitter discussion and retweets
  - ✓ Blogs with comments

Unprotected Activity & Social Media:

- **Employees MAY NOT:**
  - ✓ Make unauthorized statements on behalf of the Company
  - ✓ Reveal trade secrets or confidential Company information
  - ✓ Violate Company policies
  - ✓ Harm Company systems or maliciously harm reputation

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What If:

- Sandra, a Service Clerk, tweets on her iPhone:

"So sick of Matt making me come back from lunch early. #Reallysucks."

- ***Find out*:** Is Matt Sandra's manager?
- **Public tweet**: no expectation of privacy
- Sandra has **unfettered right** to talk about this issue
- **YOU** may now have an obligation to investigate the meal period violation, as you are now aware that a manager may have forced an employee to miss meal periods.

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Next Steps – Policy Guidelines:

- Review social media policies for language needing definitions or narrower language
- Modify broad language prohibiting employees from discussing wages, policies, schedules, safety, dress and appearance codes, work assignments, other employees, or management
- Eliminate or adjust language prohibiting posting of company logos, company name, identification of employee with the company, etc.
- Do not maintain policies requiring employees to maintain strict confidentiality over wages, bonuses, or commissions
- Add a disclaimer at the end of the policy making clear that it is not intended to restrict employee section 7 rights under the NLRA
- Where legitimate confidentiality issues are involved, define information deemed confidential (Social Security numbers, the Coke formula, strategic marketing plans, parent financial information, employee medical information, patient names or medical conditions, etc.)
- You can still restrict use of intellectual property
- You can still bar social media use during working hours
- You can require disclosure as "personal opinion"

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