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2026 Employment & Labor Relations Seminar

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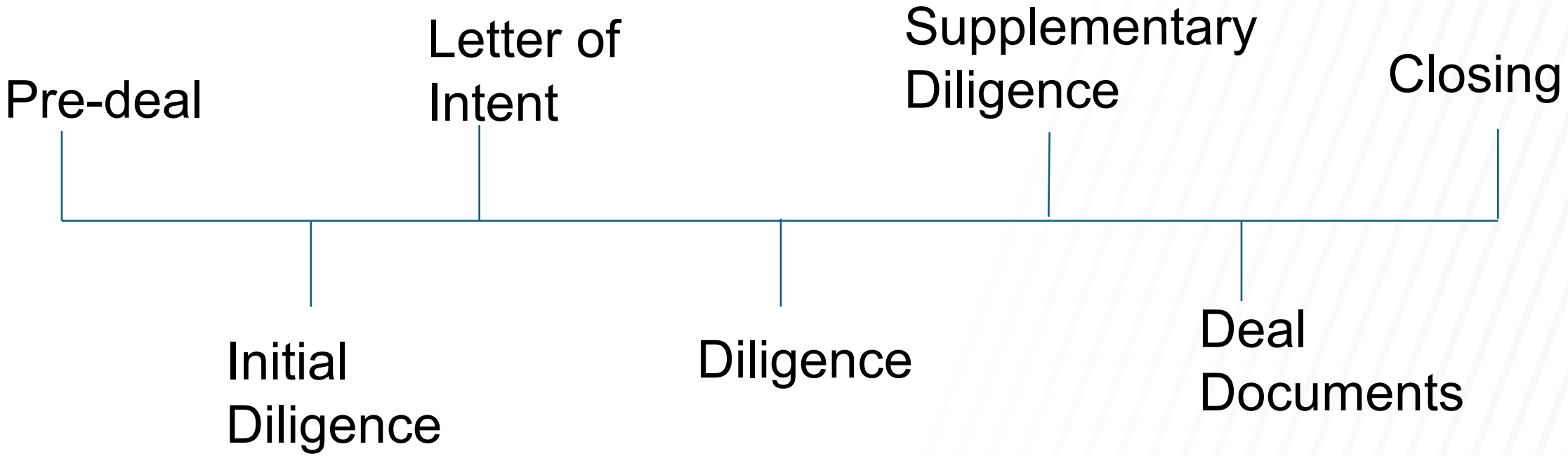
Due Diligence for M&A Deals for Labor and Employment Attorneys

Jackie Benson

Partner / Taft



Deal Overview



Considerations in Diligence

BUY SIDE

- Broad review to identify concerns and assess potential risk to buyer
- Looking for signs of management or institutional compliance issues

SELL SIDE

- Focus on preparing disclosures for Buyers and proactively remedying potential concerns to the extent possible

Common Employment Related Issues

- Classification of employees as exempt vs non-exempt
- Classification of employee vs contractor
- Overtime payroll procedures
- Equity compensation plans and change of control bonuses
- Compliance of HR policies with current law (especially Handbook and Restricted Covenants)
- Employment verification and I-9 retention
- The specter of disgruntled former employees

Pre-Deal Diligence

- Focus on identifying potential issues and resolving them before a buyer is involved.
- Gather information likely to be requested by Buyer.
- Review company policies and handbook to determine if policies are adequate and compliant.
- Address open disputes or concerns
- Try to resolve any open regulatory issues
- Consider D&O and indemnification provisions



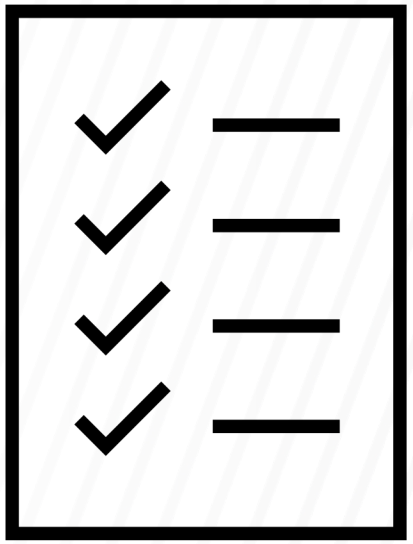
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Initial Diligence

- Buyer’s preliminary diligence review of the potential acquisition
- Typically focuses on structure, business and financial issues, but may also address significant compliance or regulatory concerns.

Letter of Intent

- May include basic terms of Employment Agreements, Non-competes/non-solicitations, offer letters, bonus plans or terminations
- Typically, more significant diligence will commence after the execution of a Letter of Intent. This process is usually kicked off with a Diligence Request List.
- Scope of diligence will depend on the size of the deal, number of employees, complexity of the structure, type of business and familiarity of the Buyer with the company.



Example of Diligence Request List

C1	Povide copies of all documents evidencing any bonus, retirement, profit sharing, incentive compensation, pension and other employee benefit plans or agreements of the Company or covering any current or former employees of the Company including: • all collective bargaining agreements; • all employment agreements and severance agreements with employees; • all consulting agreements; • all personnel policies and manuals; • all benefit plans and arrangements (including health and welfare, retirement, 401(k), profit sharing, incentive and stock option plans); • all trust agreements, amendments and written interpretations thereof; and • copies or descriptions of all management incentive or bonus plans.
C2	Identify/describe major personnel policies (e.g., bonuses, salary reviews, advances, vacation, sick leave, sexual harassment, etc.). Identify any unusual forms of compensation and/or benefits available to employees (e.g., club memberships, housing subsidies, etc.). Provide copies of employee handbook(s) and each of the foregoing policies.
C3	Describe the Company's hiring policies, including any background checks conducted on new or existing employees.

Example of Diligence Request List

C4	Provide a list of all employees of the Company, including (i) name; (ii) title or position (including whether full or part time); (iii) hire date; (iv) classification as exempt/non-exempt; (v) base compensation rate; and (vi) all commission, bonus or other incentive-based or contingent compensation paid during the previous twelve (12) months.
C5	Provide copies of all summary plan descriptions required by ERISA for all relevant plans, and copies of any other benefit plan booklets issued to employees. N/A Provide summary plan descriptions and related booklets for all health and welfare plans.
C6	Provide copies of all studies, analyses and reports regarding the funding status of any pension plans covering any employees of the Company or to which the Company is obligated to contribute.
C7	Provide a copy of the last three (3) years' actuarial valuation reports for defined benefit plans, and summaries of account balances by investment funds for defined contribution plans.
C8	Provide a copy of the last three (3) years' Form 5500s filed with the IRS, plus attachments, for all relevant plans.

Example of Diligence Request List

C9	Provide a copy of the last three (3) years' reports, analyses and testing reports relating to demonstrating compliance of all relevant plans with all applicable Internal Revenue Code and ERISA.
C10	Describe any potential liabilities under any pension plans.
C11	Provide copies of IRS determination letters for all benefit plans that are tax qualified under applicable law plus a copy of any pending determination letter request.
C12	List all labor disputes, grievances, arbitrations, unfair labor practices, litigation, EEOC actions, disputes or claims under the Americans with Disabilities Act involving the Company and provide copies of all relevant documents.
C13	Provide copies of all OSHA reports regarding inspections or investigations during the last three (3) years.
C14	Identify any work stoppages, strikes, jurisdictional disputes, secondary boycotts or the like by employees of the Company during the past five (5) years. Describe current organizational efforts, if any.

Example of Diligence Request List

C15	If the Company belongs to a multi-employer bargaining association, please include the terms and liabilities associated with membership in that association. For any multiemployer plan (active or terminated), provide an estimate of the withdrawal liability from such plan (or, for any multiemployer plan from which the Company has withdrawn, provide the amount of withdrawal liability imposed, together with any amount that remains unpaid) and funding status.
C16	Please provide documentation of any tax credit, loan, loan forgiveness or other benefit received by the Company or any of its affiliates under the CARES Act that would place limits on employee compensation or the issuance of dividends.
C17	Please provide documentation of any reductions in force, layoffs, or furloughs in the past 3 years. Please provide a list reflecting when and how many employees were affected and whether the Company issued WARN notices.
C18	Please confirm whether the Company has completed I-9 forms for every employee. Confirm whether the I-9 forms ever been audited internally or by a third party. If so, please provide dates of audits and results.
C19	Please provide copies of all tentative and/or final “no match” letters, if any, received by the Company through the Department of Homeland Security’s E-Verify program.

Diligence

- Employment and labor concerns may also be identified in litigation, regulatory, insurance and compliance responses
- Results of diligence review may be incorporated into a Diligence Memorandum or Disclosure Schedules.



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Supplementary Diligence

- Requests for more detailed information about issues identified in diligence review.
- Sometimes requests come from Reps and Warranty Insurance underwriters or lenders involved in the transaction
- These requests may seek information about risks, liability assessments, insurance coverage or potential damages

Deal Documents

- Purchase Agreement/Merger Agreement
  - Review reps and warranties relating to employment issues
  - Provisions related to future employment of employees
  - Confidentiality/Non-Compete/Non-Solicitation provisions
  - Indemnification/special indemnity
  - Termination or rollover of benefit provisions
- Disclosure Schedules
  - Reps about employment, labor issues, compliance, litigation, insurance
- Employment Agreements/Consulting Agreements/Offer Letters
- Bonus/Incentive/Retention Plans

Deal Documents

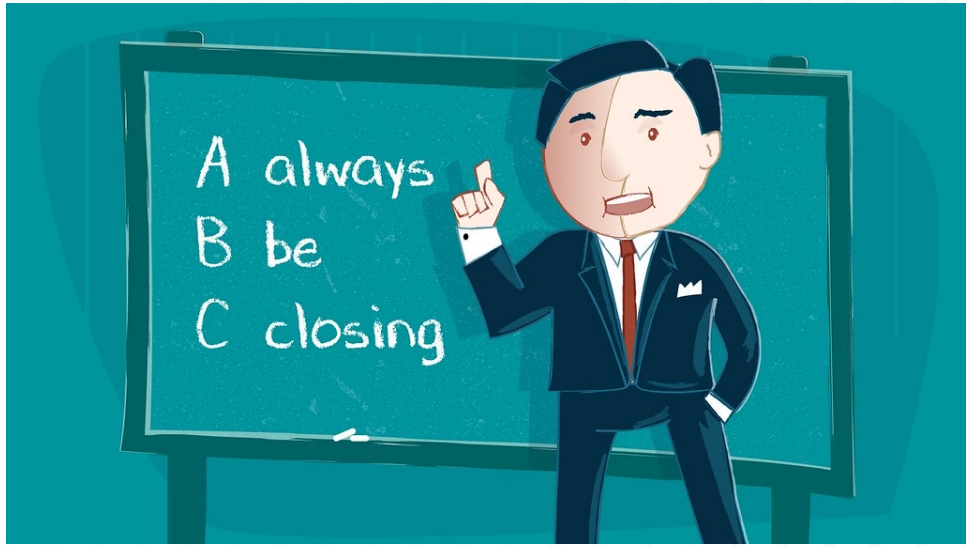
- Severance Agreements
- Termination or hiring of employees to post-close entity
- WARN Act notifications
- Tail insurance



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Closing

- Execution and effectiveness of all documents



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Post Closing

Seller

- Terminate benefit plans
- Terminate insurance

Buyer

- Onboard new employees
- Train employees on Buyer’s policies and procedures
- Adopt bonus incentive plans
- Coordinate benefits transfer

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What Is Going On At The NLRB!?!

Evan H. Cohn

Senior Associate / Taft Cincinnati



Defining The Last Year At The Board

The Board Can Act Again

- A quorum returned in January.
- By August, three Republican members were seated
- Three is the number of votes needed under the Board's traditional practice to overrule precedent.

Backlog At The Regions

- The General Counsel prioritized aged investigations, redistributed unassigned files, and changed the sequence for evidence gathering and agent assignment
- Regions remain very slow

GC Has Targeted Cases

- The GC has named 13 Biden-era precedents for active or future challenge.
- Those positions signal direction; they do not themselves change the governing rule.
- May not be an exhaustive list.

Changes In The Board's Composition

AUG 28, 2025 – JAN 7, 2026

No Quorum

Prouty was the only sitting member. The Board could not decide cases.

JAN 7 – AUG 17, 2026

Quorum: 2R + 1D

Murphy and Mayer joined Prouty. Cases moved; only two Republican votes were available.

AUG 17, 2026 – PRESENT

4 Members: 3R + 1D

Macy joined. The Board can now assemble three Republican votes; one of five seats remains vacant.

CURRENT MEMBERS

David Prouty
D • term to Aug. 27, 2031

James R. Murphy
R • Chair • term to Dec. 16, 2027

Scott A. Mayer
R • term to Dec. 16, 2029

James R. Macy
R • term to Aug. 27, 2030

Quorum And Three Affirmative Votes Are Different Thresholds

2010 SCOTUS THRESHOLD; NEW PROCESS STEEL

3 members

A quorum lets the Board conduct business and decide cases.



January 7 restored a quorum.

PRECEDENT THRESHOLD

3 yes votes

The Board follows a tradition requiring a three-member majority to overrule precedent.



The third Republican vote arrived August 17.

Practical meaning **January–August: precedent could be applied and cases decided, but the two Republican members lacked the traditional three votes to overturn or create new precedent.**

Wilcox’s Removal Challenge Closed Without SCOTUS Review

JAN 27, 2025

Removed

President Trump removed Member Gwynne Wilcox before her term expired.

DEC 2025

D.C. Circuit

Reversed the district court ruling that had restored her to the Board.

OCT 19, 2026

Cert denied

Supreme Court declined review in Wilcox v. Trump

What it means now **The Board’s current membership is the four sitting members; Wilcox is not a member.**

Two Backlogs, Two Different Stories

REGIONAL CASELOAD • FY 2025

22,497

cases received

Charge and petition intake reported in the FY2025 PAR.

258 days

average to ULP determination

Up from 168 days in FY2024; more than 100 regional staff lost.

BOARD REVIEW DOCKET • JAN–JUN 2026

591 → **387**

pending when quorum returned | **by late May / early June**

352 disposed in 5 months • 152 new cases assigned

Separate Queues

Regions investigate charges and conduct elections. The Board reviews appeals and decides precedent-setting cases. Faster Board output does not lessen regional delay.

New Regional Case Handling Protocol

1 Charge filed

For charges filed after Oct. 1, 2025, the charging party is asked to submit a chronology, documents, witness names and summaries within two weeks.

→

2 Evidence review

The Region screens the submission and prioritizes files before assigning a Board Agent; assignment depends on priority and capacity.

→

3 Assignment / investigation

May 2026: roughly 3,500 unassigned cases were shifted among 11 Regions to spread aged inventory.

Reported progress — **By Aug. 26, Carey said the agency had completed investigations in 9,247 cases pending on Jan. 7 — a reported reduction of more than 50% in cases awaiting regional determination.**

GC Office Updates

OPERATIONAL AGENDA

26-02 • 26-03 • 26-04

- Prioritize aged cases and consistent, timely case resolution.
- Favor lawful settlements within agreed parameters; enhanced remedies are not routine.
- Focus investigations on clear alleged violations and targeted evidence requests.

ENFORCEMENT AGENDA

13 precedent targets

7 already argued to the Board

6 identified for future challenges

Policy positions are not holdings. Regions are told to apply extant Board law.

Carey was sworn in Jan. 7, 2026. Her four-year role is to investigate and prosecute ULPs and supervise the Regions.

Cases Targeted For Overruling

ALREADY ARGUED • 7

- *McLaren Macomb* — severance terms
- *Stericycle* — workplace rules
- *Amazon* — captive-audience meetings
- *Siren Retail* — employer predictions
- *Tesla* — union insignia / uniforms
- *Metro Health* — consent orders
- *Endurance* — contract waiver test

FUTURE CHALLENGES • 6

- *Cemex* — bargaining orders
- *Wendt / Tecnocap* — past-practice changes
- *Kroger / Beck* — objector fee disclosures
- *Lion* — concerted activity & misconduct
- *Valley Hospital* — post-expiration dues checkoff
- *Thryv* — make-whole remedies

No More Setting-Specific Protected Activity Tests

UNANIMOUS ON THIS CASE

Apply *General Motors*

The Board in *Lion III* sent case back to the ALJ to apply the 2020 *General Motors* test, as the Fifth Circuit directed.

The court had vacated *Lion II* for exceeding the scope of remand and denying due process.

SPLIT ON THE RULE BEYOND LION

Murphy + Mayer + Macy	Lion II has no precedential value
Mayer + Macy (plurality)	General Motors remains extant precedent
Murphy	Reserved judgment on the standard beyond this remand
Prouty	Disagreed with both views

Cemex Under Pressure But Not Erased

MARCH 6, 2026 • SIXTH CIRCUIT

Brown-Forman

Refused to enforce a bargaining order that depended on *Cemex* because the Board had announced a generally applicable rule without APA notice-and-comment.

APRIL 21, 2026 • NINTH CIRCUIT

Cemex appeal

Affirmed the Board's order on a *Gissel* alternative based on pervasive unfair labor practices; it did not endorse the *Cemex* framework.

WHAT MAY COME NEXT

Two paths

The Board may return to *Gissel* / *Linden Lumber* or pursue a formal rulemaking. The NLRB sought Supreme Court review of *Brown-Forman*.

Employer implication **Do not treat *Cemex* as gone (yet). Election strategy, majority evidence, and ULP risk still matter; geography affects enforcement risk.**

Privilege In Union Information Requests

Michigan Education Association

375 NLRB No. 42 (Sept. 23, 2026)

WHAT THE BOARD HELD

A three-member Board majority upheld withholding investigation reports and supporting materials protected by attorney-client privilege and work product.

IMPORTANT LIMIT

The Board held *Detroit Edison* balancing does not apply to an attorney-client privilege claim. Prouty's dissent would protect legal advice, but not automatically the underlying factual material.

EMPLOYER MOVE

Define counsel's role and purpose early; separate legal analysis from business records; evaluate factual or nonprivileged material independently.

INVESTIGATION DESIGN

Keep the record well organized

1 Legal advice and attorney work product

2 Factual interview notes and underlying records

3 Nonprivileged information responsive to the union

"Employers with unionized workforces and unions would be discouraged from being completely forthcoming with their attorneys if they could not be certain that their privileged communications would be protected from disclosure if a union requested them . . . ."

Confidentiality & Non-disparagement Terms

Severance Agreements

McLaren Macomb, 372 NLRB No. 58 (2023)

RULE TODAY

Broad confidentiality or non-disparagement terms can unlawfully chill Section 7 rights, even without enforcement efforts.

LIKELY DIRECTION

Likely return toward the narrower *Baylor* / *IGT* line: focus on actual coercion and the agreement's practical effect.

EMPLOYER MOVE

Keep releases narrow; preserve protected-rights carve-outs and avoid language that appears to bar worker-to-worker discussion.

Work Rules

Work Rules & Handbooks

Stericycle, 372 NLRB No. 113 (2023)

RULE TODAY

A facially neutral rule is assessed from a "reasonable" employee's perspective (*i.e.*, economically dependent employee); presumed unlawful; the employer may rebut presumption with a legitimate, substantial interest and narrow tailoring.

LIKELY DIRECTION

Possible return to *Boeing's* categorical framework, giving more predictable room for rules tied to legitimate business interests.

EMPLOYER MOVE

For now, audit handbook rules for confidentiality, civility, social media, recording and solicitation; keep current wording defensible.

Work Rules (*Stericycle* Cont.)

NLRB's Current Analytical Approach to Determine the Lawfulness of Work Rules:

1. **Assess whether the General Counsel has established that a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights under the NLRA.**

    - Work rules will be analyzed from the standpoint of an employee (lay-person) who contemplates Section 7 activity but wishes to avoid the risk of being disciplined or discharged.
    - If the General Counsel carries her burden, the rule is ***presumptively unlawful.***

2. **An employer must rebut the presumption by proving: (A) that the rule advances a legitimate and substantial business interest and (B) that the employer is unable to advance that interest with a more narrowly tailored rule**.

    - The burden of proof is on the employer.
    - The NLRB describes this as "something akin to an affirmative defense"

Work Rules (*Stericycle* Cont.)

Stericycle Inc., 372 NLRB No. 113 (2023) – The Current Standard

- Pre–*Stericycle*
  - *LA Specialty Produce*, 368 NLRB No. 93 (2019).
  - *Boeing Co.*, 365 NLRB 154 (2017).
  - *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

- Commonly scrutinized work rules

  - Civility & Conduct
  - Confidentiality
  - Dress Code
  - Social Media
  - Non-Compete, Non-Solicitation, & Non-Disparagement
  - Recording Devices
  - Wage Discussions

Work Rules (*Stericycle* Cont.)

***Boeing Co.*, 365 NLRB 154 (2017)**

Decision**:** Upheld a work rule restricting the use of cameras in the workplace. Placed in the Always Lawful category. Overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Standard**:** When determining if a facially neutral work rule is lawful, the NLRB will balance two factors:

1. The nature and extent of the potential impact on NLRA rights.
2. Legitimate justifications associated with the rule.

Categorical Classification System**:**

- Category 1 – Always Lawful. Rules that do not interfere with NLRA Sec. 7 rights and rules where the adverse impacts on Sec. 7 rights were outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera in the workplace rule at issue in Boeing as well as rules calling for "harmonious interactions and relationships" and other rules calling for employees to abide by basic standards of civility.
- Category 2 – Sometimes Lawful. Rules that were sometimes lawful to maintain and warrant scrutiny.
- Category 3 – Always Unlawful. Rules that were always unlawful given their impact on protected activity. Could never be maintained by an employer. For example, a rule that prohibited employees from discussing wages or benefits with one another.

Apparel

Union Insignia

Tesla, 371 NLRB No. 131 (2022)

TODAY

Restrictions on union insignia are presumptively unlawful absent "special circumstances."

LIKELY DIRECTION

Likely restore *Wal-Mart's* more employer-friendly treatment of neutral uniform rules. *Wal-Mart* applied *Boeing*, so will depend on revival of *Boeing*.

EMPLOYER MOVE

Keep restrictions narrow, neutral and tied to documented safety, quality or customer needs.

Three Rules That Shape Organizing Efforts

Captive Audience Meetings

Amazon.com Services, 373 NLRB No. 136 (2024)

RULE TODAY

Employers must give reasonable advance notice of the subject and a real chance to leave without reprisal (truly voluntary).

LIKELY DIRECTION

Carey asks to restore *Babcock & Wilcox*; mandatory meetings generally permitted absent threats or retaliation.

EMPLOYER MOVE

To comply, keep meeting invitations voluntary; train on protected speech and no threats.

Employer Predictions

Siren Retail / Starbucks, 373 NLRB No. 135 (2024)

RULE TODAY

A prediction about unionization (*e.g.*, can no longer address issues individually with employer) be unlawful if it reasonably implies employer control or a threat.

LIKELY DIRECTION

Likely return to *Tri-Cast's* objective, facts-based prediction framework.

EMPLOYER MOVE

Tie forecasts to verifiable facts, opinions, experiences; do not imply retaliation or closure as a choice.

Recognition / Bargaining Orders

Cemex, 372 NLRB No. 130 (2023)

RULE TODAY

A union showing majority support can trigger a duty to recognize or promptly seek an election; certain ULPs can lead to a bargaining order.

LIKELY DIRECTION

Carey expects to argue for *Gissel / Linden Lumber* – bargaining orders for severe ULPs that make a fair rerun election unlikely, with recognition duties tied to the traditional framework.

EMPLOYER MOVE

Maintain election readiness; respond promptly to organizing activity; investigate and remediate alleged ULPs.

How We Got To *Cemex*

1949

Joy Silk

A card majority could require recognition unless the employer had a good-faith doubt about majority support.

1969

Gissel

An election stayed preferred. A bargaining order remained a remedy when ***serious*** violations made a fair rerun unlikely.

1971 / 1974

Linden Lumber

A refusal to recognize based only on cards was not itself an unfair labor practice. The union could petition for an election.

2023

Cemex

Overruled *Linden Lumber*: recognize a card majority or promptly seek an election. Broadened bargaining orders for election period ULPs.

Union Demands Recognition Under *Cemex*

UNION DEMANDS RECOGNITION

Claims majority support in an appropriate unit

01 RECOGNIZE

Voluntarily Recognize

Begin bargaining with the union. No election is required if the employer voluntarily recognizes.

02 TEST SUPPORT

File RM Petition Within 14 days

Test majority status or the unit. If the union already filed an RC petition, no duplicate RM is needed.

SEPARATE ELECTION REMEDY

If the employer takes the election route, *any* ULP that requires setting aside the election can mean a bargaining order instead of a rerun (even if the union loses the election)

Unilateral Changes

Wendt / Tecnocap

372 NLRB Nos. 135–136 (2023) • past practice

RULE TODAY

The Board narrowed when employers may make unilateral changes consistent with past practice during bargaining first contract or after a contract expires.

LIKELY DIRECTION

Likely return toward *Raytheon*: more room for regular, established past practice within employer discretion, subject to limits on newly created practices.

EMPLOYER MOVE

Inventory recurring practices and discretion under each CBA; do not rely on pre-union conduct as an automatic defense.

Endurance Environmental

373 NLRB No. 141 (2024) • bargaining waiver

RULE TODAY

A unilateral-change defense generally requires a clear and unmistakable contractual waiver of bargaining rights.

LIKELY DIRECTION

Likely return to *MV Transportation's* "contract coverage" test: action within the contract's scope may not require a separate express waiver.

EMPLOYER MOVE

Map each proposed change to specific CBA language; bargain before changing terms if coverage is uncertain.

Consent Orders

Metro Health

373 NLRB No. 89 (2024) • *consent orders*

RULE TODAY

The Board will not accept a respondent's proposed order over objections from both the General Counsel and charging party; true agreed settlements remain available.

LIKELY DIRECTION

Carey seeks to restore *UPMC* and *Independent Stave*, allowing the judge or Board to accept an adequate settlement or order despite objections.

EMPLOYER MOVE

If a charge arises, evaluate whether a settlement resolves the alleged harm and meets Board requirements; do not assume a unilateral offer ends the case.

Dues Checkoff & Union Financial Disclosures

Valley Hospital

371 NLRB No. 160 (2022) • dues checkoff

RULE TODAY

Employers must continue dues checkoff after a CBA expires until a successor agreement or valid overall impasse.

LIKELY DIRECTION

Likely return to *Bethlehem Steel*: the dues-checkoff obligation ends when the agreement expires.

EMPLOYER MOVE

Do not stop deductions until current law and contract are checked.

UFCW Local 700

361 NLRB 420 (2014) • financial disclosures

RULE TODAY

Unions must provide nonmembers who object to fees enough information to evaluate chargeable versus nonchargeable expenses.

LIKELY DIRECTION

Carey argues for more detailed, itemized financial disclosure to objectors; the practical reach is limited to applicable fee arrangements.

EMPLOYER MOVE

Understand the fee and disclosure framework; monitor rather than change routine payroll.

Expanded Remedies

CURRENT BOARD RULE

Thryv, Inc.

372 NLRB No. 22 (2022)

Adds compensation for direct or foreseeable pecuniary harms caused by an unfair labor practice, alongside traditional make-whole relief.

APPELLATE MAP

9th	3rd	6th	5th
approved	rejected	rejected	rejected

Likely Board direction

Move back toward traditional backpay / reinstatement

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Professional Ethics: HR vs Lawyer

William Wright, J.D., Ph.D.

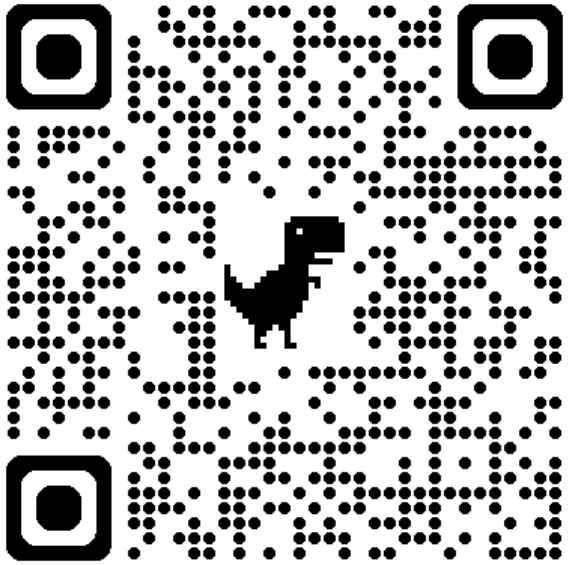


Ethics and Professional Ethics

- Ethics: The study of what to do and how to do it.
- Code of Ethics: A systematic set of guidelines and rules. Having a code of ethics is a mark of a profession.
- Professional codes of ethics are attempts by people who share a common calling to prepare guidelines and rules they can each rely on in deciding what to do and how to do it in common situations they face in their calling

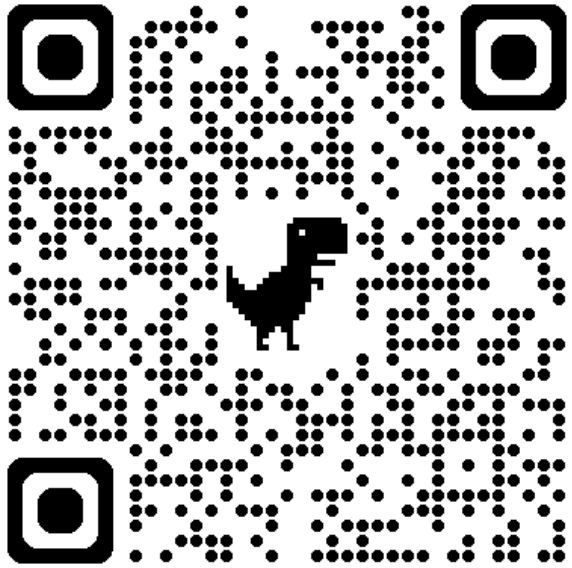
Ethics and Professional Ethics

- HR: SHRM Code of Ethics (https://www.shrm.org/about/bylaws-and-code-of-ethics/code-of-ethics)



Ethics and Professional Ethics

- Law: Colorado Rules of Professional Conduct (https://www.cobar.org/RulesofProfessionalConduct)



Duties to Client/Employer

HR – SHRM Code of Ethics

- Add value to the organizations we serve
- Contribute to the ethical success of those organizations
- Measure effectiveness of HR in contributing to or achieving organizational goals.
- Safeguard restricted or confidential info.

Law – Colo. RPC

- 1.2: Abide by client's decisions on objectives
- 1.4(a): Keep clients informed generally and about anything requiring client's consent. Consult when Rules limit lawyer's conduct.
- 1.6: Do not reveal information relating to the representation unless the client gives informed consent. (See below)

Duties to the Public

HR – SHRM Code of Ethics

- Ethically responsible for promoting and fostering fairness and justice.
- Create and sustain an environment that encourages all individuals to reach fullest potential.
- Respect uniqueness and intrinsic worth of every individual.
- Treat people with dignity, respect, and compassion.
- Assure inclusiveness and a commitment to diversity.

Law – Colo. RPC

- Exception to 1.6: the lawyer may reasonably reveal info to prevent reasonably certain death, bodily harm or the client's intention to commit a crime.
- 4.1: No knowingly false statements.
- 4.3: Don't claim to be disinterested.
- 4.4: Don't embarrass or burden non-client.
- 4.5: Don't threaten charges to obtain an advantage.
- 8.4(g): Don't appeal to or engender bias.



Three Scenarios

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Legal Advice

Legal Advice

- VPHR visits Lawyer in Lawyer's office and asks for advice concerning a compliance issue.
- The VP is concerned that the payroll department, under the VP's supervision, is not properly calculating employee overtime pay.
- VP's concerns?
  - Professional Responsibility: As HR professionals, we are responsible for adding value to the organizations we serve.
  - Intent: To assist the organizations we serve in achieving their objectives and goals.
  - Guidelines: Comply with the law.

Legal Advice

- VPHR visits Lawyer in Lawyer's office and asks for advice concerning a compliance issue.
- The VP is concerned that the payroll department, under the VP's supervision, is not properly calculating employee overtime pay.
- How does Lawyer start?

Legal Advice

- VPHR visits Lawyer in Lawyer's office and asks for advice concerning a compliance issue.
- The VP is concerned that the payroll department, under the VP's supervision, is not properly calculating employee overtime pay.
- How does Lawyer start?
  - First, I have to advise you that I represent the employer and do not represent you personally.
- VPHR's reaction?

Legal Advice

- First, I have to advise you that I represent the employer and do not represent you personally.
- Why?
  - CRPC 4.3: The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel . . ., if the lawyer reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interest of the client.
  - CRPC 1.13(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - CRCP 1.13(f) In dealing with an organization's . . . employees . . . or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Legal Advice

- First, I have to advise you that I represent the employer and do not represent you personally.
- The issue:
  - Colorado wage law incorporates 29 U.S.C. § 203(d): “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

Selecting an Investigator

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Ethical HR practice:

- Ethical Use of Information
  - HR professionals consider and protect the rights of individuals . . . .
  - Guidelines: Acquire and disseminate information through ethical and responsible means.
  - Investigate the accuracy and source of information before allowing it to be used in employment-related decisions.

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

As a matter of ethical HR practice, the investigator the VP picks should be:

- Committed to Fairness and Justice – We are ethically responsible for promoting and fostering fairness and justice for all employees and their organizations."
- Guidelines: Respect the uniqueness and intrinsic worth of every individual.
- Treat people with dignity, respect, and compassion to foster a trusting work environment . . . .

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

As a matter of standard operating procedure, the investigator the VP picks should be:

- "Independent" i.e. uncontrolled by any affected person
- Trained
- Expert in applicable employer policies
- Knowledgeable about similar past investigations (you keep records of these)
- Able to apply standards of proof and other relevant legal concepts
- A good deponent and an excellent trial witness

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Lawyer tries to evade the assignment. Why?

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Lawyer tries to evade the assignment. Why?

- CRPC 3.7(a): A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . .
- Anything else?

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Lawyer tries to evade the assignment. Why?

- Is the lawyer "independent"?
- Do you want the investigator to SAY the investigation is "independent?"
- Do you expect the investigator to compile "evidence" and "cross examine" the witnesses?
- Do you expect the investigator to act like a TV Prosecutor – misrepresenting evidence and witness statements, offering deals on how the decision will be described, threatening prosecution?

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Lawyer tries to evade the assignment. Why?

- CRPC 4.1: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].

Selecting an Investigator

VPHR approaches the employer's usual outside Lawyer and asks for an investigation.

Lawyer tries to evade the assignment. Why?

- CRPC 8.4(c): It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients . . . or investigators, who participate in lawful investigative activities.
- Formal Ethics Opinion 137 (2019).
  - "Lawful investigative activity?"
  - Investigators may not entice or trick a person into wrongful conduct.
  - In any case, the lawyer may not misrepresent, especially to a court. The lawyer can only supervise or advise.

Selecting an Investigator

So, should HR do the investigation under the advice/ supervision of Lawyer?

Remember:

- Fairness and Justice
  - We are ethically responsible for promoting and fostering fairness and justice for all employees and their organizations.
  - Guidelines: Respect the uniqueness and intrinsic worth of every individual.
  - Treat people with dignity, respect, and compassion to foster a trusting work environment . . .
- Ethical Use of Information
  - HR professionals consider and protect the rights of individuals . . . .

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Advising on a Voluntary Contribution

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Advising on a Voluntary Contribution

Security Employee voluntarily installs proprietary security surveillance system. Employer did not request the system. The system does not identify additional threats. Security Employee demands reimbursement.

VPHR asks Lawyer whether Employer should reimburse Security Employee.

Advising on a Voluntary Contribution

Security Employee voluntarily installs proprietary security surveillance system. Employer did not request the system. The system does not identify additional threats. Security Employee demands reimbursement.

VPHR asks Lawyer whether Employer should reimburse Security Employee.

- Lawyer: Employer MAY reimburse Security Employee. (No legal prohibition.)
- VPHR: But SHOULD we?

Advising on a Voluntary Contribution

SHRM: Fairness and Justice: As human resource professionals, we are ethically responsible for promoting and fostering fairness and justice for all employees and their organizations.

CRPC 2.1: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Advising on a Voluntary Contribution

- But does Attorney-Client Privilege apply?
- *See* Pownell v. Credo Pet. Corp., 2011 U.S. Dist. LEXIS 35869 (D. Colo. 2011) ("Because the privilege promotes the dissemination of sound legal advice, it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice.")(quotation marks and sources omitted).

Duties to Self

SHRM

- As professionals, we must commit to strengthen our competencies on a continuous basis.

Law

- CRPC 1.1: A lawyer shall provide competent representation to a client.
- Opinion 146: All lawyers have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. This extends to . . . supervisory and managerial lawyers within the firm.

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