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### NLRB Majority Issues Final Rule Resulting in Controversy and Likely Court Challenge

On December 21, 2011 the National Labor Relations Board released a controversial final rule that is designed to speed the agency's election process. A divided NLRB in a 3-1 ruling issued the order that makes a number of changes to the election process. The most significant change is that the NLRB eliminated the existing rule that elections are not to be scheduled within 25 days of the decision to schedule an election. The period of time between when an election petition is filed and the election takes place is generally the period where an employer can educate employees regarding the disadvantages of unionization. The fear for management groups that oppose the new rule is that elections will be conducted before employers have an opportunity to effectively campaign against the union's organizing efforts. The other changes will limit the ability of an employer to appeal decisions made regarding election issues. The net impact of the new rule may be elections taking place much sooner than the existing practice. For unions changing the NLRB election process so that elections take place quickly after a petition has been filed has been an important goal for many years. The rule is scheduled to be effective April 30, 2012. It is expected that legal challenges to the rule will be filed well before that date.

### U.S. Department of Labor Proposes Extending Overtime and Minimum Wage Law to Home Care Workers

The Fair Labor Standards Act ("FLSA") dates back to 1938 and has always excluded home care workers providing "companionship services" in a home. On December 27, 2011 President Obama announced proposed regulations that will sharply limit "companionship services" to activities like playing cards and visiting friends. In addition, all in-home care workers employed by third-party employers would automatically be subject to minimum wages and overtime. The change should dramatically expand the number of home care workers subject to overtime provisions. Critics claim that the proposed change will increase the cost of care. Final regulations are not expected until later this year.

### Manager Fired for Allegedly Creating "Fearful" Environment Had No Claim for Unlawful Discharge

On December 22, 2011 the U.S. Court of Appeals for the Eighth Circuit ruled that a Hispanic branch manager for W.W. Grainger Inc. had no viable bias or contract claims. (*Martinez v. Grainger*, 8th Cir. No. 11-1422). Mr. Martinez's employment ended when a number of his subordinates complained about his behavior. In response to the complaints, HR conducted an investigation that concluded that Mr. Martinez "ran a tight ship" but had also created a "fearful environment" by yelling at employees and on one occasion swearing at an employee. When Mr. Martinez seemed unwilling to acknowledge the issues identified, he was terminated.

Mr. Martinez filed suit claiming that his termination was due to bias and that the company handbook formed a contract. With respect to the bias claim, the court dismissed it reasoning that the employer had a lawful basis to fire Mr. Martinez - his "problematic managerial style." The court dismissed the handbook claim noting that the handbook stated that employment was "at-will" as such the contract claim was not viable.

### Court Allows EEOC to Proceed with Claim on Behalf of Severely Obese Employee

The Equal Employment Opportunity Commission may proceed to trial on behalf of a residential treatment center employee that was severely obese. (*EEOC v. Resources for Human Dev.*, E.D. La. No. 10-3322 December 7, 2011). The federal decision is the most recent in a number of decision addressing whether obesity is a disability under the Americans with Disabilities Act. The plaintiff, a treatment counselor, weighed 400 pounds when she was hired. When she was fired in 2007, 8 years later, she weighed 527 pounds and the employer terminated her asserting that she was physically unable to perform the duties of the position. The court determined that the employees' obesity was a disability and ruled that a jury would need to determine if the employer unlawfully terminated employment because the employee was perceived as being disabled or if the termination was, in fact, due to poor job performance.