

Our Top 10 Labor Law Events Of 2012

December 31, 2012 | [National Labor Relations Board, Labor Relations](#)



**Gerald F.
Lutkus**

Of Counsel
(Retired)



RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

Election Rules
NLRB

The Mayans predicted that the world would end in 2012. They were wrong. However, U.S. employers may well be feeling like life is over as they once knew it after the head-spinning events of 2012 in traditional labor law. And the scary thing is, the NLRB has just gotten started, folks, as it enters 2013 with a three-member majority, all of whom are pro-Union Democratic appointees.

Your friends at BTLaborRelations.com have decided to again ring out the old year with our unscientific ranking of the Top 10 Labor Law events of the past year. After putting our heads together, here's what we came up with:

10. **D.R. Horton and Arbitration Agreements.** The Board started the year with an astonishing ruling that an arbitration agreement containing a class action waiver violated the NLRA because it infringed on the right employees

have to " [engage in concerted action for mutual aid or protection](#) ." The Board has stood by its decision and recently followed it in an [advice memo](#) despite the fact that the Supreme Court and the Courts of Appeals are – so far – turning a cold shoulder to it.

You can read our previous coverage of D.R. Horton by clicking on the following links:

[Board Finds Certain Arbitration Agreements Violate NLRA](#)
[California Court of Appeals Not Persuaded by D.R. Horton Inc. v. Michael Cuda](#)
[D.R. Horton Files Reply Brief in Appeal of NLRB Decision](#)
[In the Spirit of DR Horton, ALJ Extends Protections to Job Applicants](#)
[NLRB ALJ Finds Employee Arbitration Policy Unlawful](#)

9. Ho Ho's and Hockey. Labor disputes have resulted in the shutdown of one American tradition and has caused a lock-out in another. As previously [reported here](#) , after the Bakers Union turned down a concessionary contract, Hostess announced that it was closing its doors and liquidating the Company. While out on the ice, the lights have remained off as the NHL and the NHLPA have continued to struggle to reach an agreement on a new collective bargaining agreement. Today is Day 104 of the lock-out. Here are links to our coverage of the lock-out.

[NHL Labor Clock Ticking Entering the Labor Day Weekend](#)
[NHL-NHLPA Talks Appear Stalled?](#)
[NHLPA Seeks to Block Lockout Under Provincial Labour Law](#)
[NHL Lockout: Day 73](#)
[NHLPA Decertification in the Works?](#)

8. Recess Appointments. The President's recess appointments of NLRB members continue to be the issue that won't go away. On Dec. 5, 2012, oral argument in *Noel Canning v. NLRB* was held before a three-judge panel of the United States Court of Appeals for the D.C. Circuit. At issue is whether the appointments were legal. If the appointments were not legal, then it calls into question whether under *New Process* the NLRB had a quorum to act. Our prior posts on this topic can be [found here](#) .

7. Off-Duty Access. In *Sodexo America*, the Board ruled that a hospital policy restricting employees' off-duty access violated Section 8(a)(1) of the NLRA. USC University Hospital in Los Angeles had an Off-Duty Access Policy which provided that off-duty employees were not allowed to enter or re-enter the interior of the Hospital or any other work areas outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business. The Board found that policy to be overbroad and interfered with employee rights under Section 7 of the Act. Our prior post on this topic can be [found here](#) .

6. Quickie Elections and NLRB Posting Rules. The NLRB's actions in promulgating new posting requirements and revising the election rules to create a "quickie" or "ambush" election made our [Top 10 of 2011](#) . And they're back again because both of those initiatives have been held up by Court action and are still in litigation and on appeal. Perhaps 2013 will be the year when we finally know whether the rules are legal and will be applied or were unlawfully promulgated. Stay tuned. You can access all of our prior postings on these issues [here](#) and [here](#) .

5. Dues Deductions. The NLRB's relentless march towards dismantling

years and years of U.S. labor law continued this month when the Board [overruled its own 50-year old policy](#) on whether dues must be withdrawn from employee checks after the expiration of a collective bargaining agreement. The Board, on Dec. 12, 2012, overruled its *Bethlehem Steel* decision from 1962 and held that after the expiration of a CBA, an employer will continue to be obligated to withdraw dues from employee checks and forward them to the union.

4. At-Will and Confidentiality Provisions. The Board continued to press its authority and jurisdiction over non-union workplaces in decisions dealing with routine at-will disclaimer acknowledgments and confidentiality policies for internal employer investigations. The Board has found both to be violative of employee rights under Section 7 of the Act. Board action in both of these areas is forcing employers to closely examine at-will disclaimers and the manner in which they conduct internal investigations. [Here](#) are our previous posts on these subjects.

3. The Holiday Blitzkrieg. The Board's holiday gift to U.S. organized labor didn't go unnoticed. In [an avalanche of game-changing rulings](#), the Board acted to "gut" Beck rights for dues protestors; required employers to deduct union dues even after contract expiration dates; exerted jurisdiction over teachers in charter schools; required employers to pay taxes and social security costs on backpay awards; required bargaining over discretionary discipline in the time frame between union recognition and enactment of a first contract; overturned "Facebook firings"; and [overturned a well-settled rule](#) that protected witness statements from disclosure to the union.

2. Social Media. The Board clearly identified social media as a priority issue in 2012. During the year, Acting GC Lafe Solomon issued three separate guidance memos on social media in which the agency made it clear that it viewed most employer restrictions on off-duty work-related social media chatter to interfere with employee rights to engage in protected concerted activity. We've written about this issue repeatedly during 2012. You can find out prior posts [here](#).

1. Right to Work. After years and years of no progress on Right to Work legislation, amazingly and somewhat surprisingly, [Indiana and Michigan during 2012 became the 23rd and 24th states in the U.S. to pass Right to Work laws](#). Both are also the first Rust Belt states to pass the legislation. The actions of both states underscore the disconnect that is occurring in labor policy in the U.S. As federal labor policies continue to accelerate to the left, states such as Indiana, Michigan, Ohio, Wisconsin and Arizona try to hold the line. Looking forward to 2013, the dramatically differing directions of state and federal labor policy may prove to be one of the most interesting stories of the coming year.

We at the BTLabor Relations blog thank you for staying with us during 2012 and hope you continue to follow us in 2013. Happy New Year!