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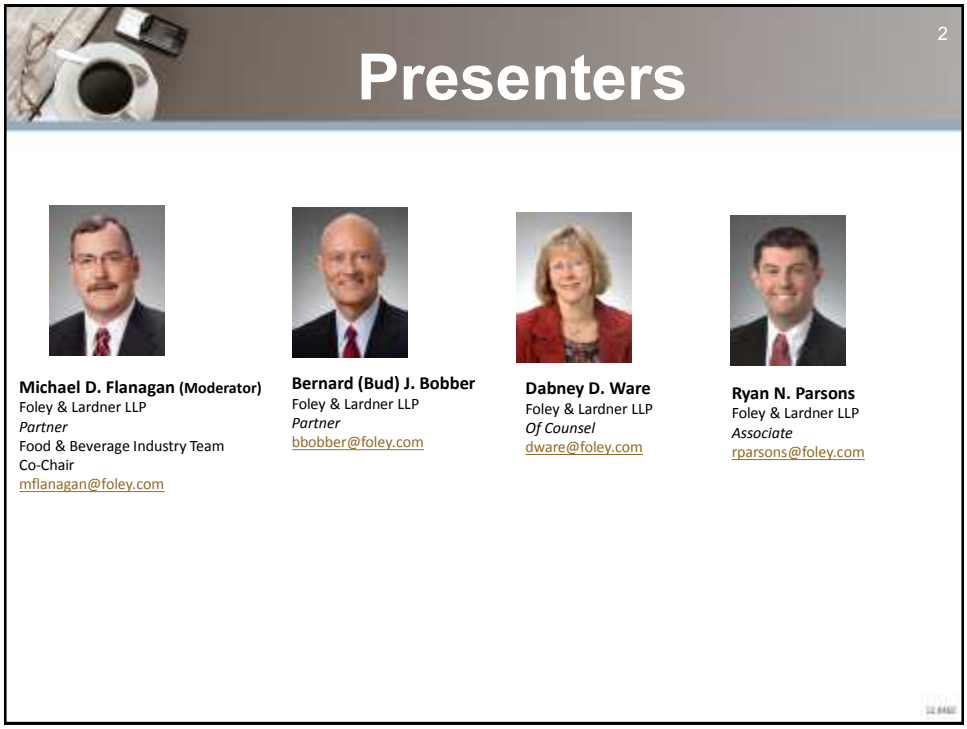
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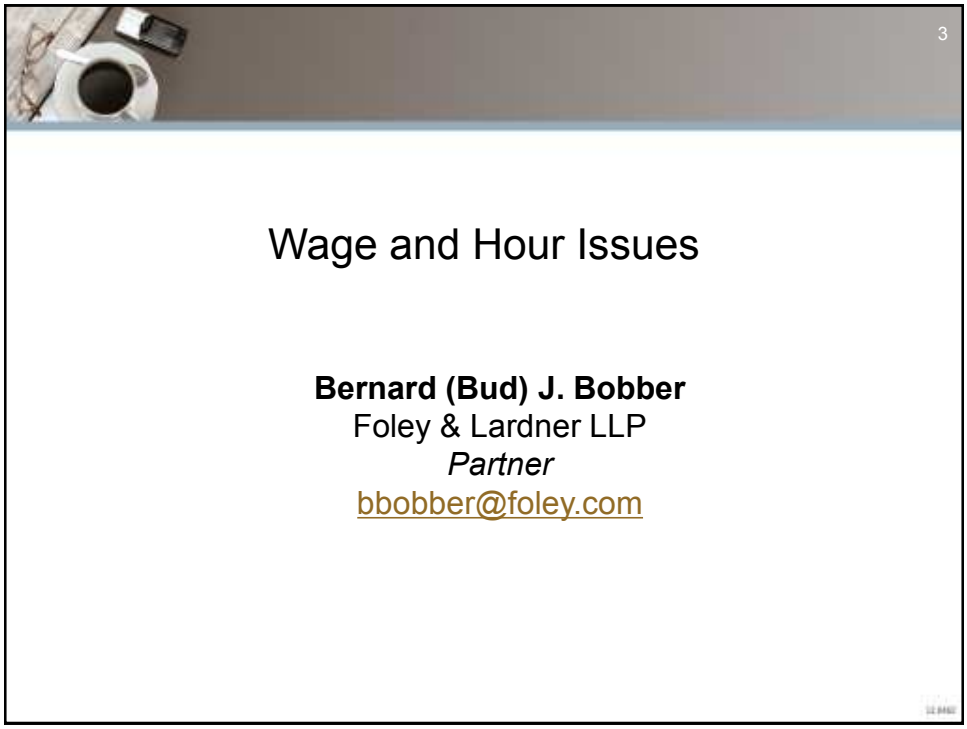
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Wage and Hour Issues
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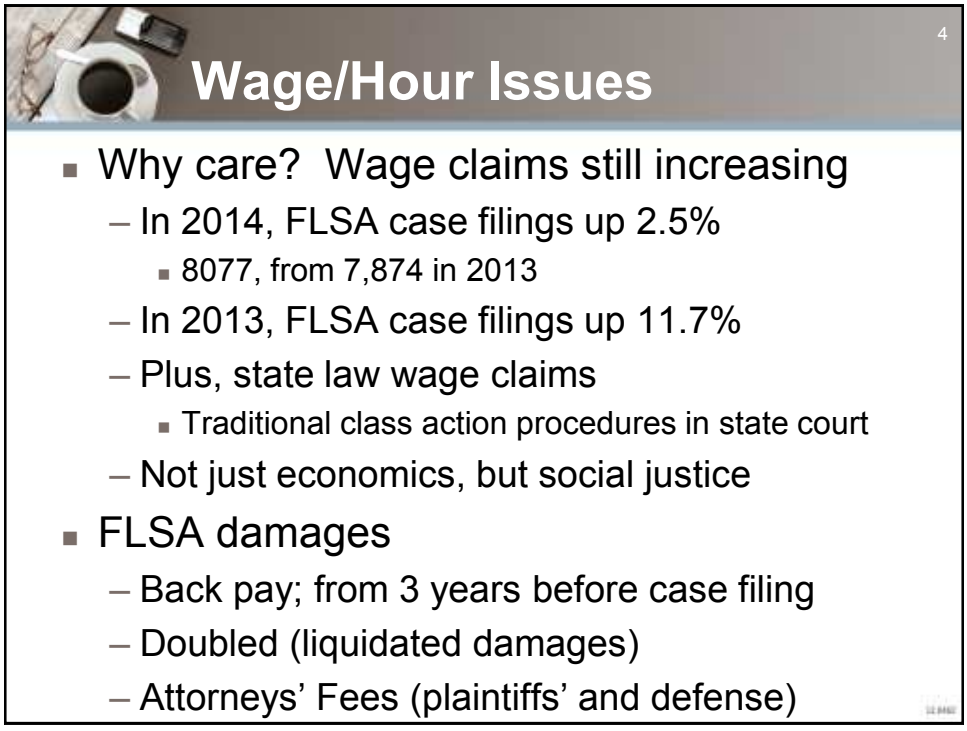
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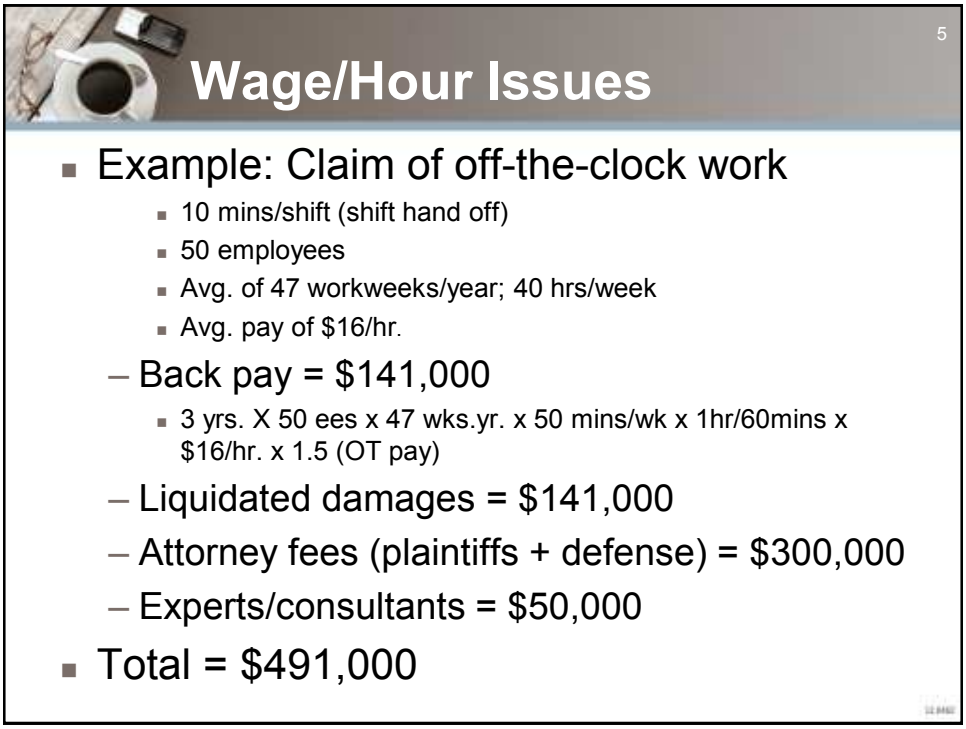
Wage/Hour Issues
Why care? Wage claims still increasing
In 2014, FLSA case filings up 2.5%
8077, from 7,874 in 2013
In 2013, FLSA case filings up 11.7%
Plus, state law wage claims
Traditional class action procedures in state court
Not just economics, but social justice
FLSA damages
Back pay; from 3 years before case filing
Doubled (liquidated damages)
Attorneys' Fees (plaintiffs' and defense)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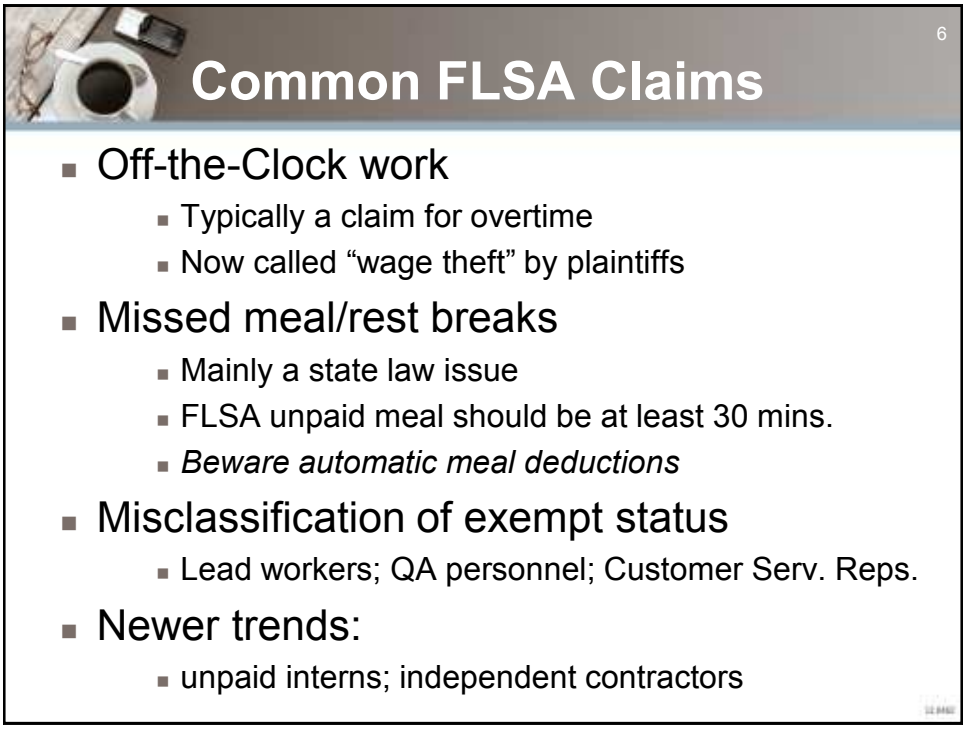
Wage/Hour Issues
Example: Claim of off-the-clock work
10 mins/shift (shift hand off)
50 employees
Avg. of 47 workweeks/year; 40 hrs/week
Avg. pay of $16/hr.
Back pay = $141,000
3 yrs. X 50 ees x 47 wks.yr. x 50 mins/wk x 1hr/60mins x $16/hr. x 1.5 (OT pay)
Liquidated damages = $141,000
Attorney fees (plaintiffs + defense) = $300,000
Experts/consultants = $50,000
Total = $491,000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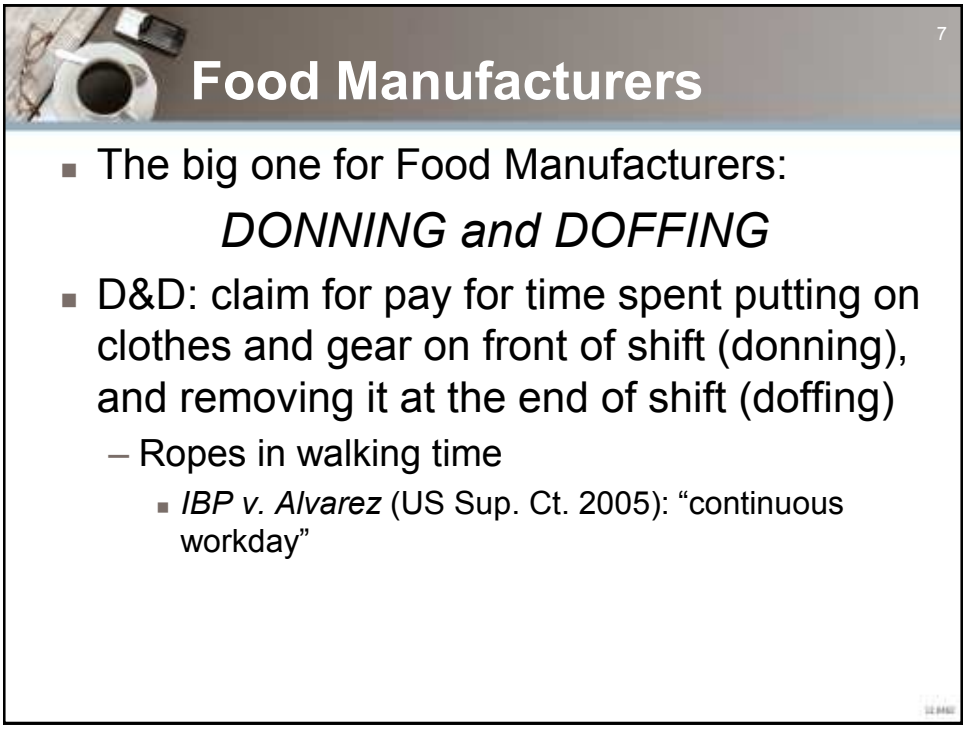
Common FLSA Claims
Off-the-Clock work
Typically a claim for overtime
Now called “wage theft” by plaintiffs
Missed meal/rest breaks
Mainly a state law issue
FLSA unpaid meal should be at least 30 mins.
Beware automatic meal deductions
Misclassification of exempt status
Lead workers; QA personnel; Customer Serv. Reps.
Newer trends:
unpaid interns; independent contractors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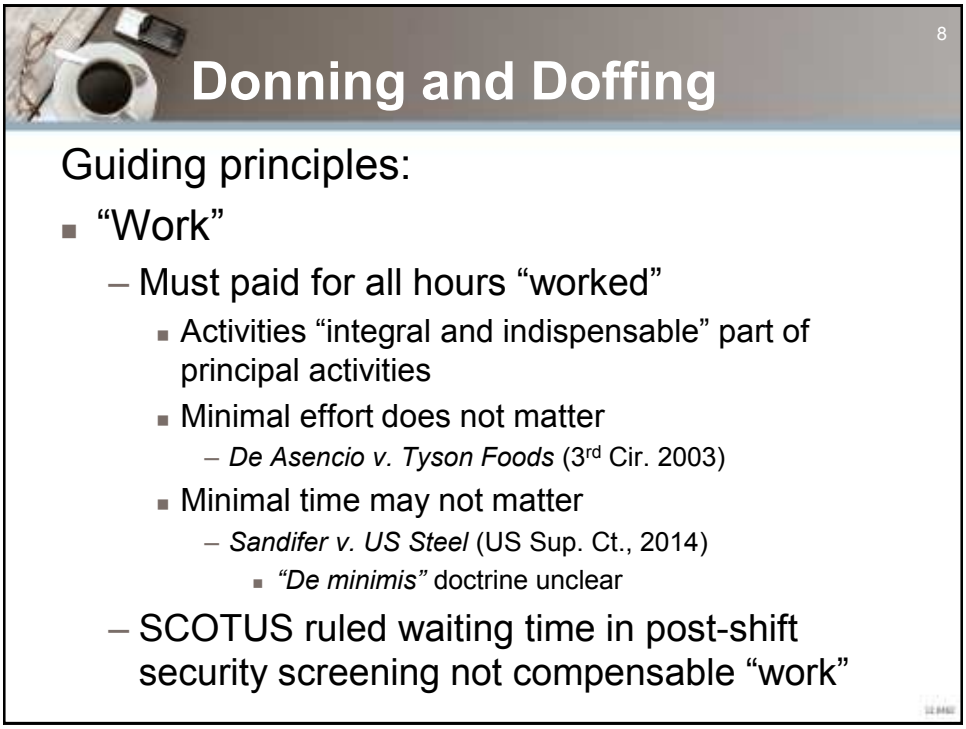
Food Manufacturers
The big one for Food Manufacturers:
DONNING and DOFFING
D&D: claim for pay for time spent putting on clothes and gear on front of shift (donning), and removing it at the end of shift (doffing)
– Ropes in walking time
IBP v. Alvarez (US Sup. Ct. 2005): "continuous workday"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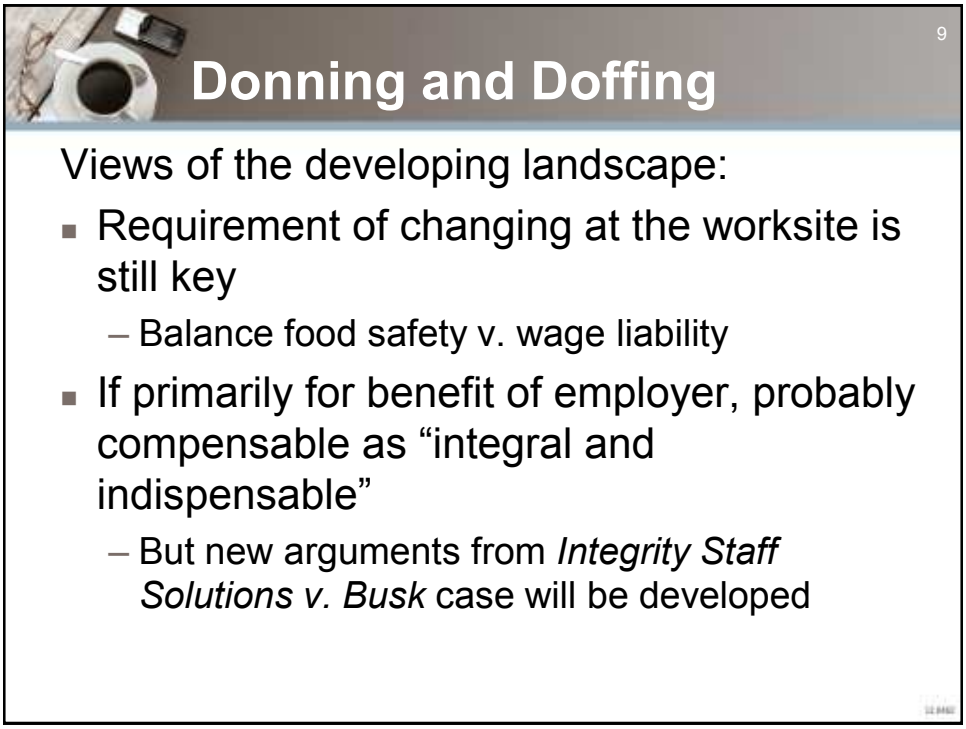
Donning and Doffing
Guiding principles:
"Work"
– Must paid for all hours "worked"
Activities "integral and indispensable" part of principal activities
Minimal effort does not matter
– De Asencio v. Tyson Foods (3rd Cir. 2003)
Minimal time may not matter
– Sandifer v. US Steel (US Sup. Ct., 2014)
"De minimis" doctrine unclear
– SCOTUS ruled waiting time in post-shift security screening not compensable "work"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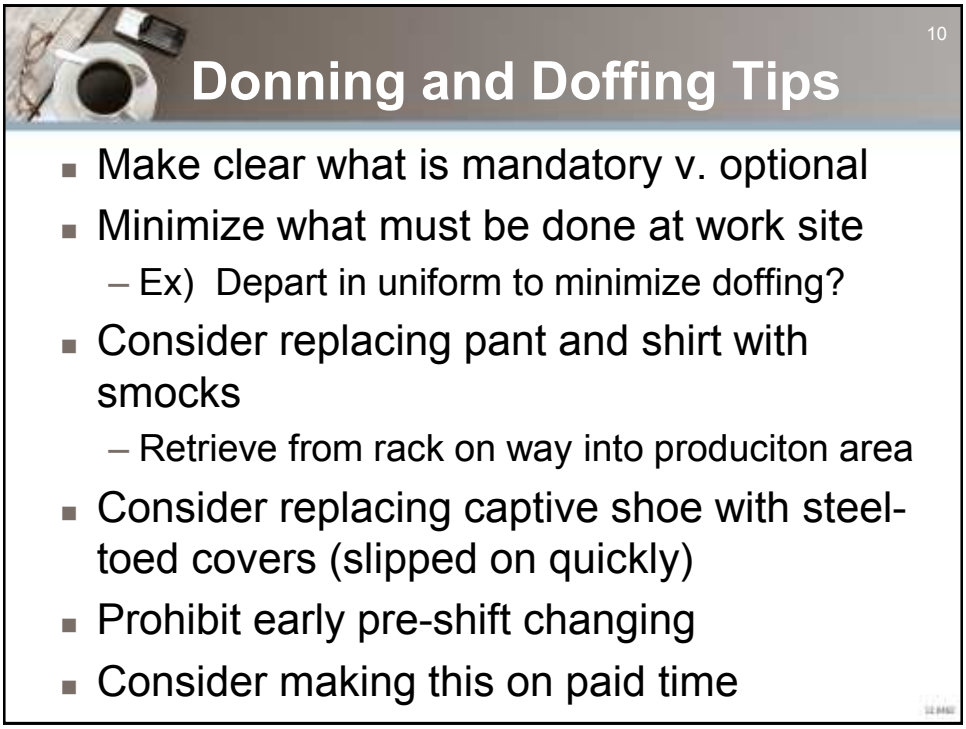
Donning and Doffing
Views of the developing landscape:
Requirement of changing at the worksite is still key
– Balance food safety v. wage liability
If primarily for benefit of employer, probably compensable as “integral and indispensable”
– But new arguments from *Integrity Staff Solutions v. Busk* case will be developed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Donning and Doffing Tips
Make clear what is mandatory v. optional
Minimize what must be done at work site
– Ex) Depart in uniform to minimize doffing?
Consider replacing pant and shirt with smocks
– Retrieve from rack on way into produciton area
Consider replacing captive shoe with steel-toed covers (slipped on quickly)
Prohibit early pre-shift changing
Consider making this on paid time

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## Donning and Doffing Tips

- Extra tool in unionized workplaces
  - FLSA 203(o) CBA exemption
  - Supreme Court ruled "clothes changing" includes PPE (hairnet, safety glasses, hearing protection, bump cap, etc.)
- *Beware* – Unionized employees sue any way but under state law
  - Theory rejected in IL and MO, but traction in WI

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## Employee Concerns with FMLA or ADA

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## Beginning Thoughts – what may be in play . . .

- Federal Laws (and possible state equivalents)
  - Family and Medical Leave (or state version)
  - Americans with Disabilities
- Company or Local Issues (too individualized to be big part of today's discussion, but can't be forgotten)
  - Company policies (attendance, sick, etc.)
  - Company benefits (PTO, STD, etc.)
  - Collective bargaining agreement
  - Workers Compensation
  - Other mandated benefits (required sick leave) or applicable legal requirements

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## General Considerations

- Consistency vs. need for individual analysis
- Your common sense won't trump opinion of medical provider (but may be basis for second opinion)
- You are expected to use your common sense, unless it appears to be stereotyping or paternalistic
- What's best option to minimize legal risk but achieve business objective
- Differing policy goals
  - FMLA - protect employee's right to be away from work
  - ADA - helps employee stay at work (requires reasonable accommodation unless undue hardship)
  - Worker's Compensation - provides automatic compensation for on the job injuries and reflects public policy trade-off of automatic, but limited liability

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## What If . . .

- In walking production area, you observe line employee coughing (a lot)?
- Options –
  - Ask/confirm status
  - Send home (paid or unpaid per policy)
  - Alert HR to possible need for leave
  - Require FFD for Return to Work

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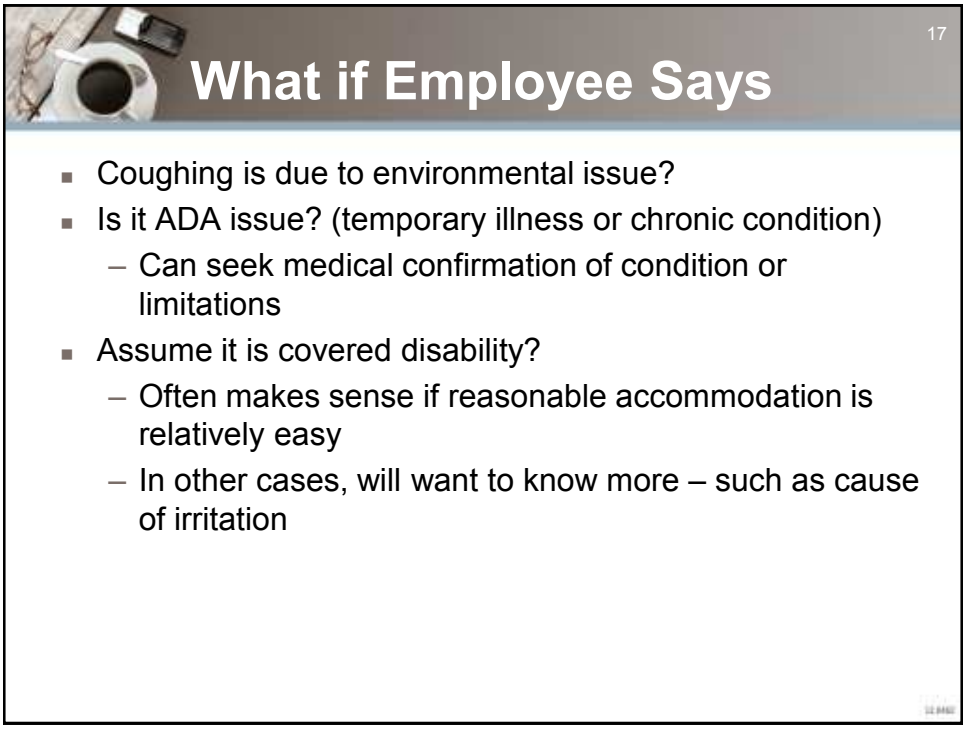
## Would it Make A Difference If . . .

- Facility/community is in midst of flu outbreak?
- Employee was out last week to take care of sick child (has now exhausted their paid leave)?
- Employee says has emphysema?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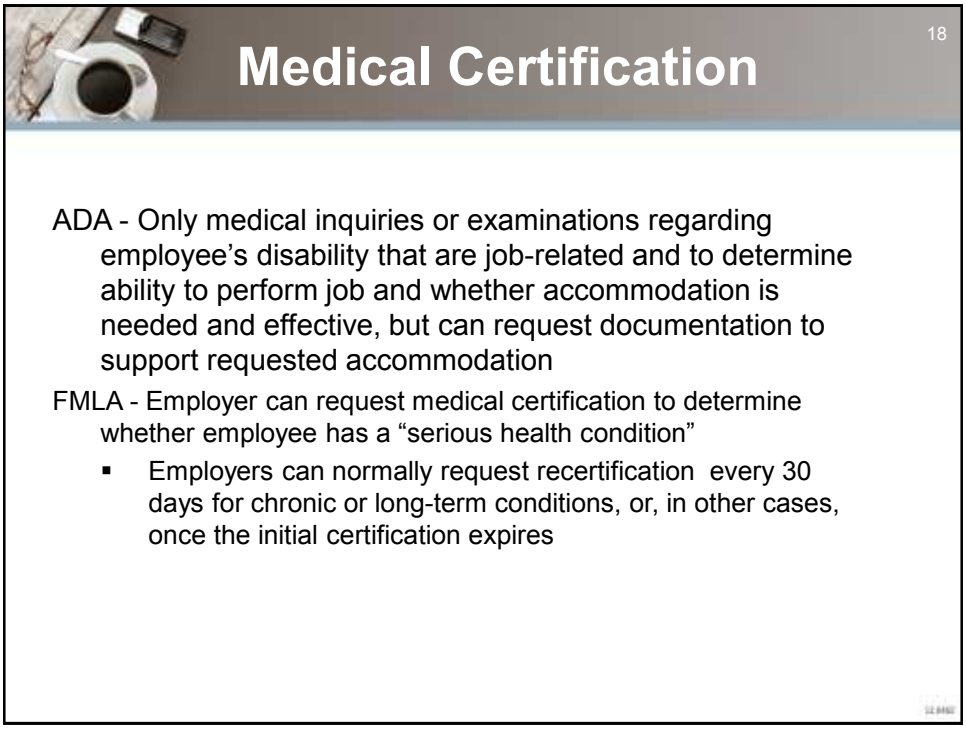
What if Employee Says
Coughing is due to environmental issue?
Is it ADA issue? (temporary illness or chronic condition)
Can seek medical confirmation of condition or limitations
Assume it is covered disability?
Often makes sense if reasonable accommodation is relatively easy
In other cases, will want to know more – such as cause of irritation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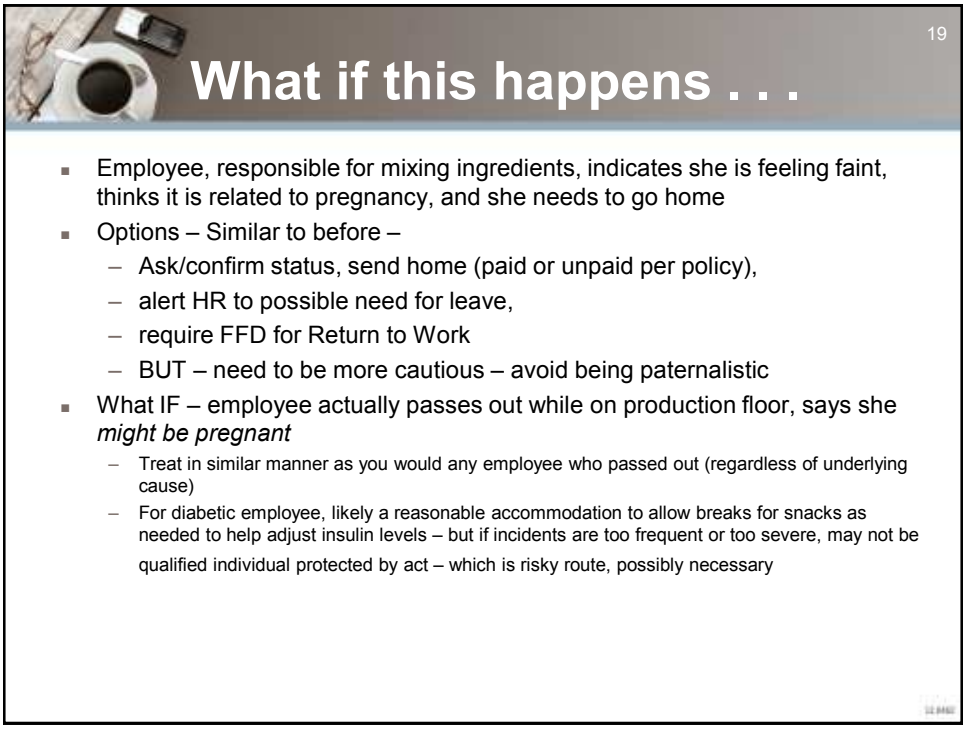
Medical Certification
ADA - Only medical inquiries or examinations regarding employee's disability that are job-related and to determine ability to perform job and whether accommodation is needed and effective, but can request documentation to support requested accommodation
FMLA - Employer can request medical certification to determine whether employee has a "serious health condition"
Employers can normally request recertification every 30 days for chronic or long-term conditions, or, in other cases, once the initial certification expires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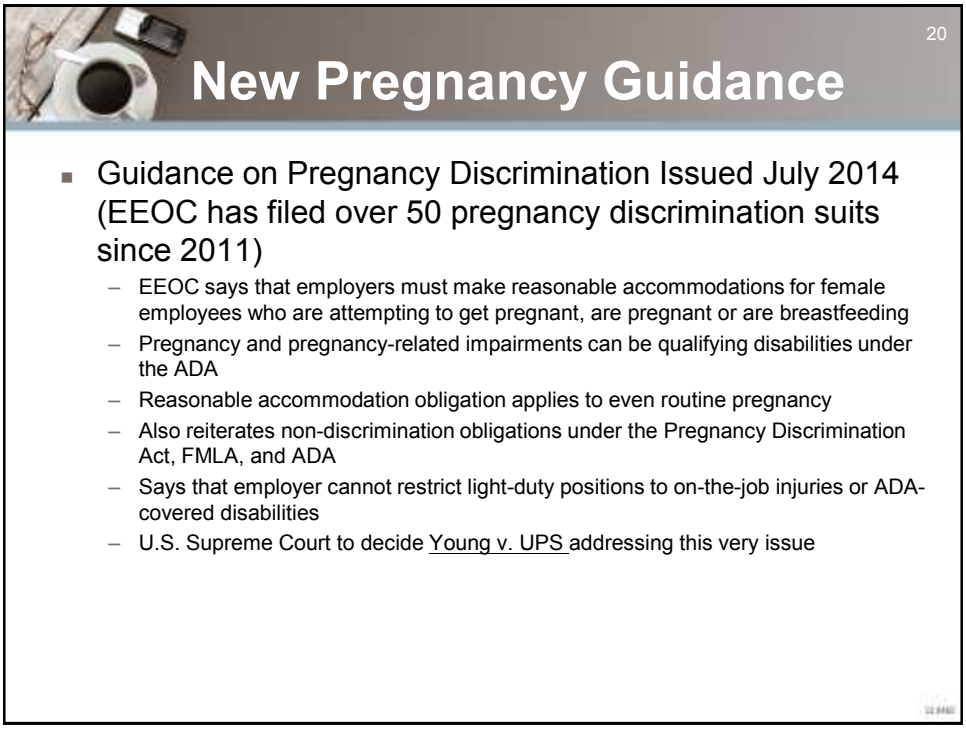
What if this happens . . .
Employee, responsible for mixing ingredients, indicates she is feeling faint, thinks it is related to pregnancy, and she needs to go home
Options – Similar to before –
Ask/confirm status, send home (paid or unpaid per policy),
alert HR to possible need for leave,
require FFD for Return to Work
BUT – need to be more cautious – avoid being paternalistic
What IF – employee actually passes out while on production floor, says she might be pregnant
Treat in similar manner as you would any employee who passed out (regardless of underlying cause)
For diabetic employee, likely a reasonable accommodation to allow breaks for snacks as needed to help adjust insulin levels – but if incidents are too frequent or too severe, may not be qualified individual protected by act – which is risky route, possibly necessary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New Pregnancy Guidance
Guidance on Pregnancy Discrimination Issued July 2014 (EEOC has filed over 50 pregnancy discrimination suits since 2011)
EEOC says that employers must make reasonable accommodations for female employees who are attempting to get pregnant, are pregnant or are breastfeeding
Pregnancy and pregnancy-related impairments can be qualifying disabilities under the ADA
Reasonable accommodation obligation applies to even routine pregnancy
Also reiterates non-discrimination obligations under the Pregnancy Discrimination Act, FMLA, and ADA
Says that employer cannot restrict light-duty positions to on-the-job injuries or ADA-covered disabilities
U.S. Supreme Court to decide Young v. UPS addressing this very issue

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## Pregnancy-Related Accommodations

- Guidance describes the following reasonable accommodations for pregnancy-related impairments (essentially similar to what might occur under ADA):
  - Redistributing marginal functions that the employee cannot perform
  - Modifying how job functions are performed
  - Modifying workplace policies
  - Purchasing or modifying equipment or devices
  - Modifying work schedules
  - Granting leave
  - Temporary assignment to light duty position

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## Reassignment/Light Duty

- **FMLA**
  - Cannot force employee to accept light duty
  - During a **planned** FMLA Intermittent or Reduced Schedule Leave, employer can temporarily reassign the employee to a job with the same pay and benefits
- **WC**
  - Limit light duty for WC injuries
  - Refusal of offered work will often result in loss of employee's wage loss benefits
  - Limited duration – must be temporary job or will also be required to provide for non-occupational ADA
- **ADA**
  - Not generally required to create position – fact specific
  - May provide on temporary basis without creating obligation to continue (but be specific about temporary nature at outset).

## What if you Notice . . .

Employee is having recent difficulty with focus (not tracking ingredients properly, failing to monitor / properly record process). At meeting with supervisor, employee says she has a drinking problem and is being treated for depression.

FMLA – may be leave eligible for treatment

ADA – alcoholism may be disability, depression likely is – but "focused" tasks are likely essential function, reasonable accommodation could be leave for treatment or reassignment

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## What Changes if . . .

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- What if employee says she wants to keep working, but her current job is too stressful (which is creating anxiety and, in turn, focus problems)?
  - FMLA and ADA still in play
  - But, want to clarify what she may be needing to address issues – leave for treatment (FMLA) or reassignment
  - Depending on nature or severity of prior issues, may want follow up regarding ability to work in current job
- What if there was good documentation of prior problems, supervisor plans meeting to terminate employment, but before being terminated, employee requests leave?

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## What If . . .

- Employee says he has a severe seafood allergy, so he cannot work when a certain product is made (even though production is limited to portion of facility). He submits a note from his doctor confirming the allergy, and requesting to work limited times.
- Do we need to modify his assignments or schedule? What are the WC issues? FMLA issues? ADA issues?
- How does it change if allergy is less severe, so can work at anytime, allergy merely affects which portion of facility?

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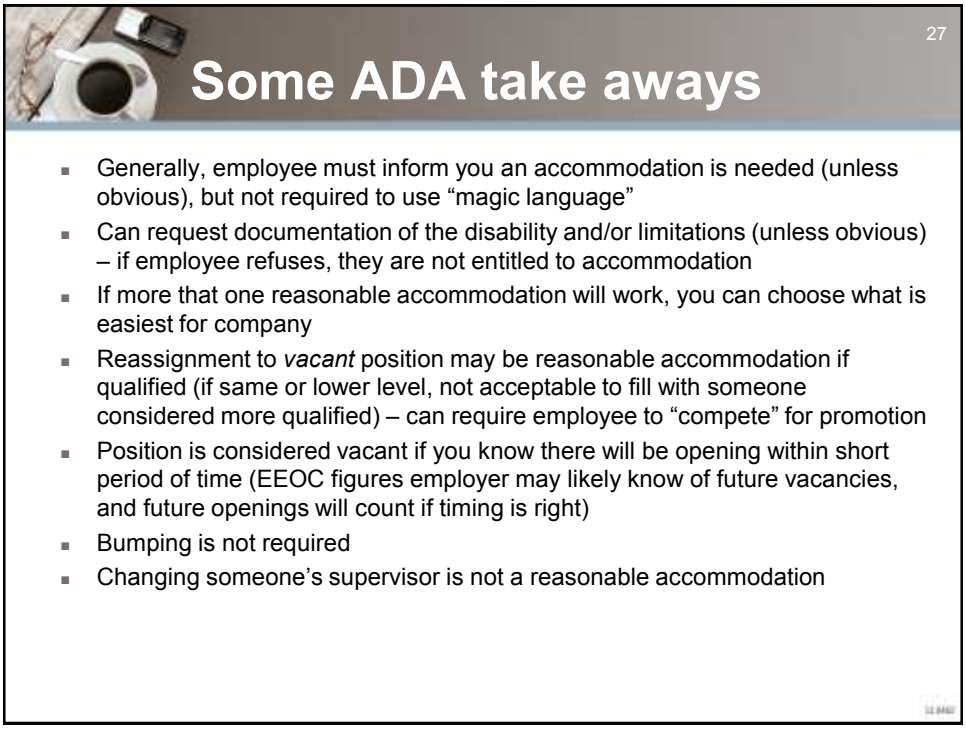
## Some FMLA take aways

- Can receive additional medical opinion(s) - at company expense, follow protocol
- During the leave entitlement, an employee is entitled to reinstatement to his former position, or a position with equivalent pay, benefits, and duties
- Very strict standard of “equivalent”
- At the end of leave, job reinstatement rights cease (but still need to consider ADA)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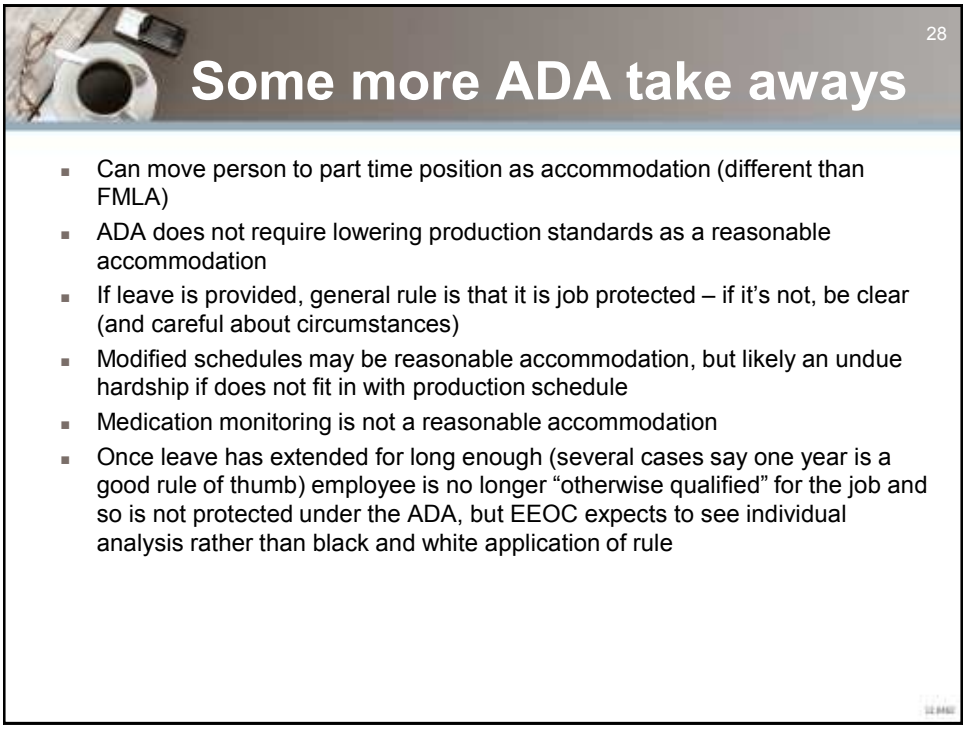
Some ADA take aways
Generally, employee must inform you an accommodation is needed (unless obvious), but not required to use "magic language"
Can request documentation of the disability and/or limitations (unless obvious) – if employee refuses, they are not entitled to accommodation
If more that one reasonable accommodation will work, you can choose what is easiest for company
Reassignment to *vacant* position may be reasonable accommodation if qualified (if same or lower level, not acceptable to fill with someone considered more qualified) – can require employee to "compete" for promotion
Position is considered vacant if you know there will be opening within short period of time (EEOC figures employer may likely know of future vacancies, and future openings will count if timing is right)
Bumping is not required
Changing someone's supervisor is not a reasonable accommodation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Some more ADA take aways
Can move person to part time position as accommodation (different than FMLA)
ADA does not require lowering production standards as a reasonable accommodation
If leave is provided, general rule is that it is job protected – if it's not, be clear (and careful about circumstances)
Modified schedules may be reasonable accommodation, but likely an undue hardship if does not fit in with production schedule
Medication monitoring is not a reasonable accommodation
Once leave has extended for long enough (several cases say one year is a good rule of thumb) employee is no longer "otherwise qualified" for the job and so is not protected under the ADA, but EEOC expects to see individual analysis rather than black and white application of rule

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# Even more ADA take aways

- Not required to provide accommodation if undue hardship –
  - Undue hardship is not judged solely on financial difficulty, EEOC guidance relies on whether the accommodation is "unduly extensive, substantial, disruptive" or would "fundamentally alter the nature of or operation of the business"
  - Help yourself by documenting interactive process - what was considered, why is it not an option
  - Undue hardship determined by "net cost" to employer and EEOC guidance indicates you must take into account items such as tax credits, or if deemed to be an undue hardship, have option to request employee pay portion
  - Creating a morale problem for other employees is not an undue hardship, while being disruptive to ability of others to work may be an undue hardship

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# Labor Law Issues for Food Manufacturers

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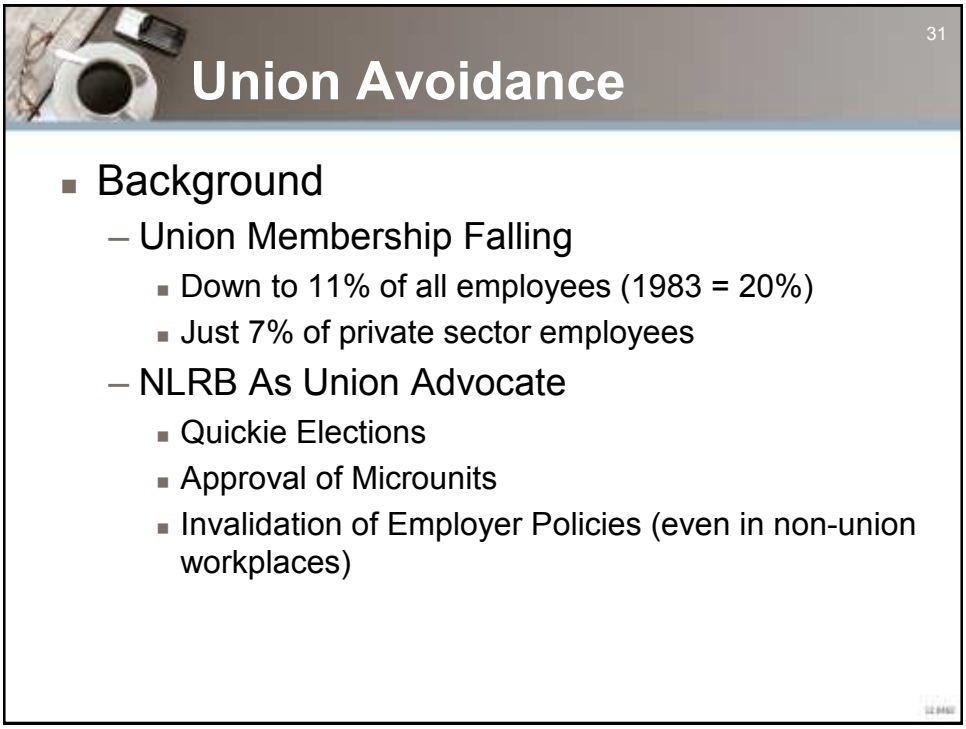
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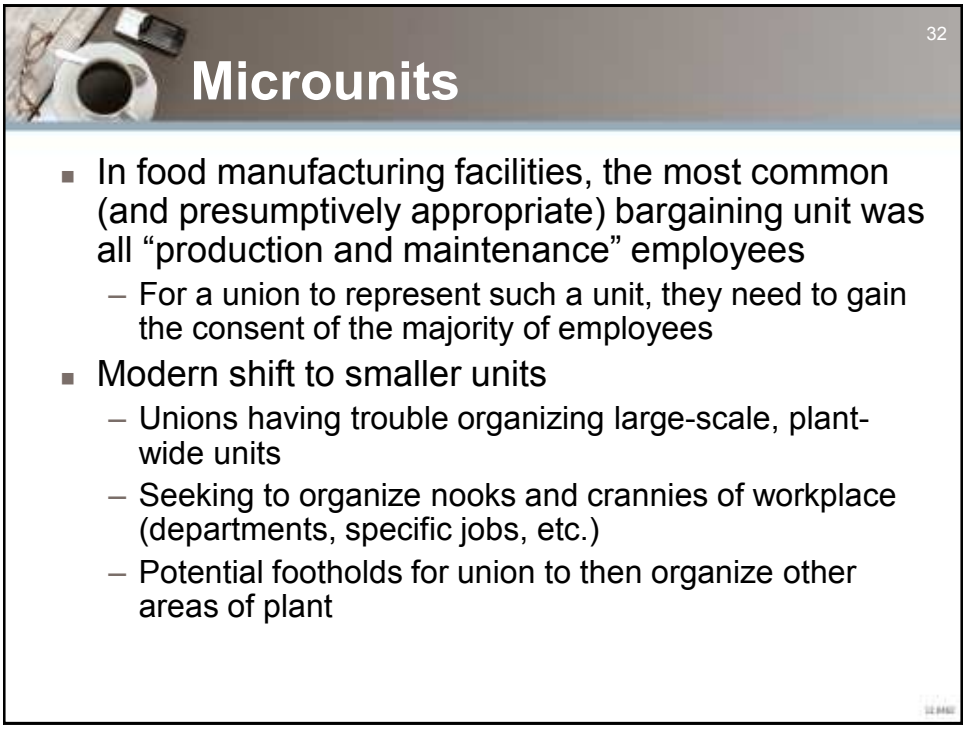
Union Avoidance
Background
Union Membership Falling
Down to 11% of all employees (1983 = 20%)
Just 7% of private sector employees
NLRB As Union Advocate
Quickie Elections
Approval of Microunits
Invalidation of Employer Policies (even in non-union workplaces)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Microunits
In food manufacturing facilities, the most common (and presumptively appropriate) bargaining unit was all “production and maintenance” employees
For a union to represent such a unit, they need to gain the consent of the majority of employees
Modern shift to smaller units
Unions having trouble organizing large-scale, plant-wide units
Seeking to organize nooks and crannies of workplace (departments, specific jobs, etc.)
Potential footholds for union to then organize other areas of plant

## Microunits

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- NLRB has Blessed this microunit approach
  - As long as the employees in the proposed unit do not share an "overwhelming community of interest" with employees outside the unit, the unit will be considered appropriate
  - *Specialty Healthcare & Rehab Ctr.*, 357 NLRB No. 83 (2011)

## How Can Food Manufacturers Avoid Microunits?

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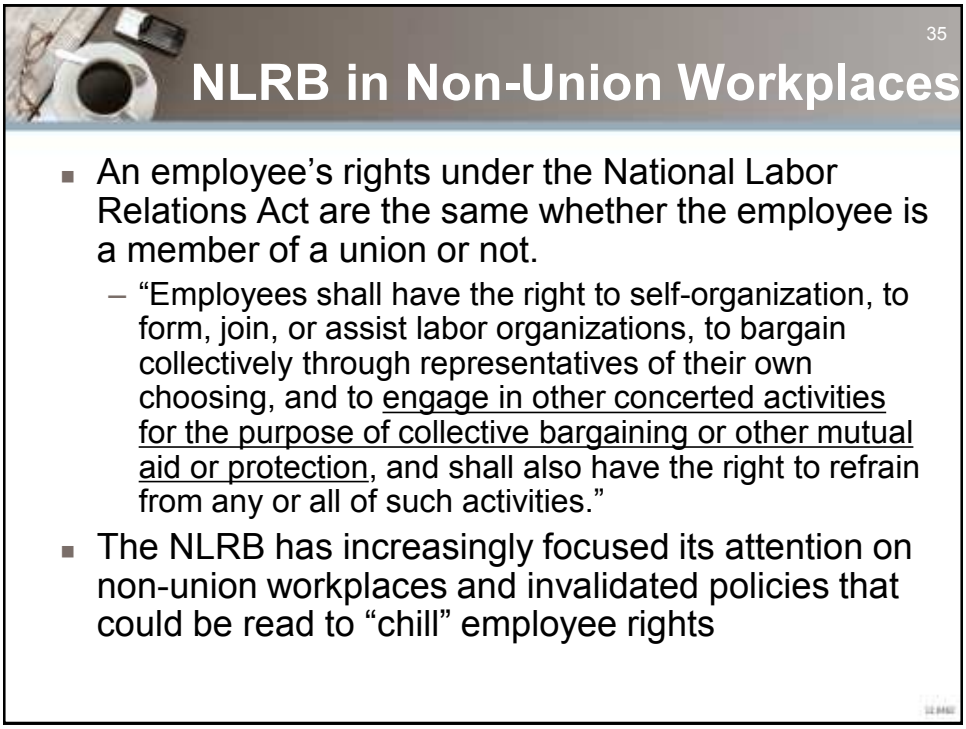
- Review your org charts
  - "Separate supervision" is a key factor in allowing microunits
  - Show common supervision at lowest levels possible
- Create uniform policies
  - Scrutinize policies that apply only to certain departments or jobs
- Consider programs that allow employees to move from one department to another (*e.g.*, training for production employees to allow them to become maintenance employees)
- Allow employees to cover for one another across departments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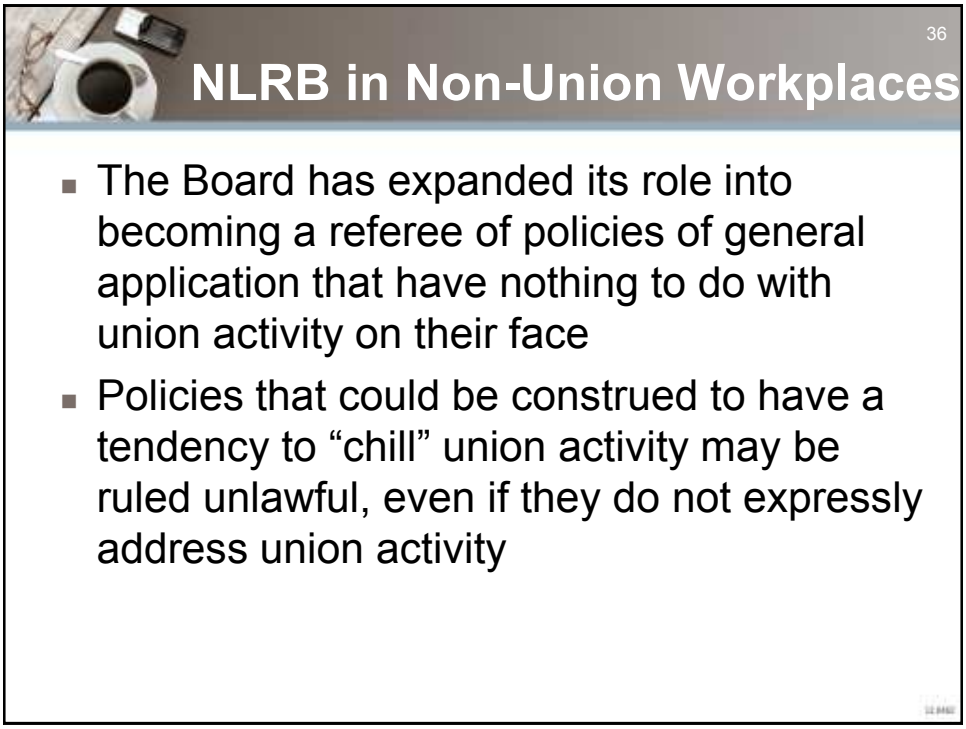
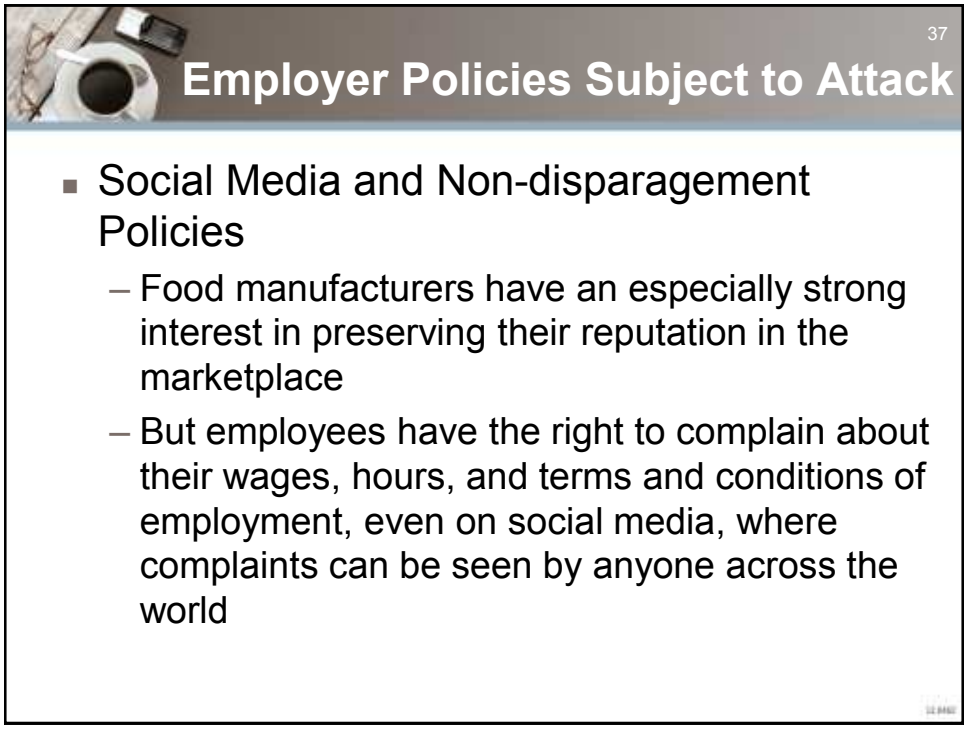
NLRB in Non-Union Workplaces
An employee's rights under the National Labor Relations Act are the same whether the employee is a member of a union or not.
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives 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."
The NLRB has increasingly focused its attention on non-union workplaces and invalidated policies that could be read to "chill" employee rights


36
NLRB in Non-Union Workplaces
The Board has expanded its role into becoming a referee of policies of general application that have nothing to do with union activity on their face
Policies that could be construed to have a tendency to "chill" union activity may be ruled unlawful, even if they do not expressly address union activity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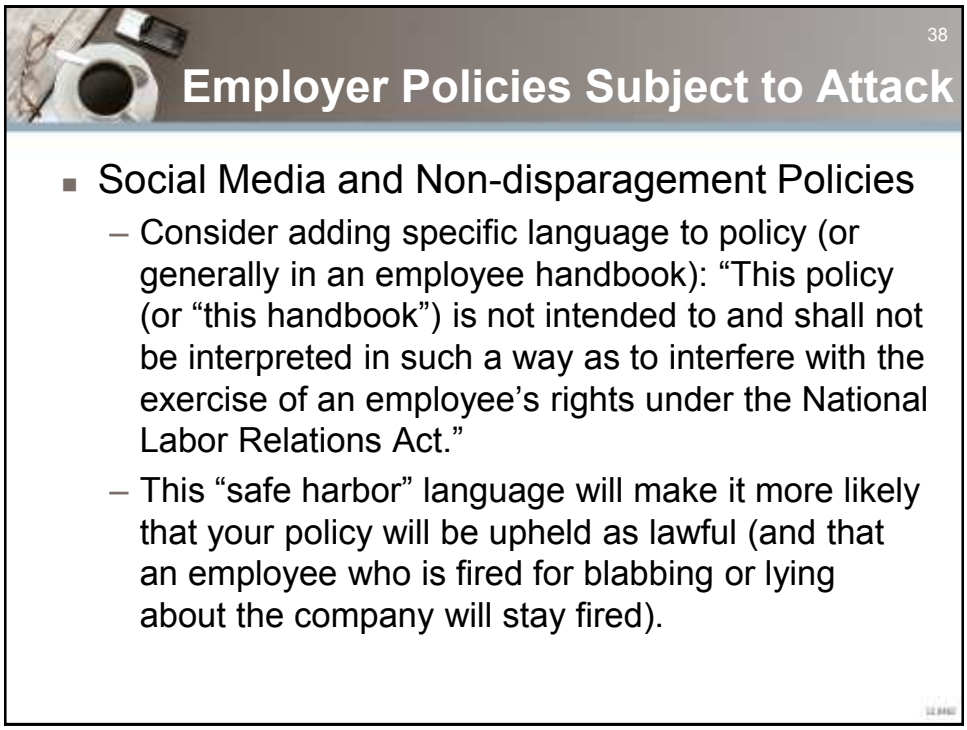
Employer Policies Subject to Attack
Social Media and Non-disparagement Policies
– Food manufacturers have an especially strong interest in preserving their reputation in the marketplace
– But employees have the right to complain about their wages, hours, and terms and conditions of employment, even on social media, where complaints can be seen by anyone across the world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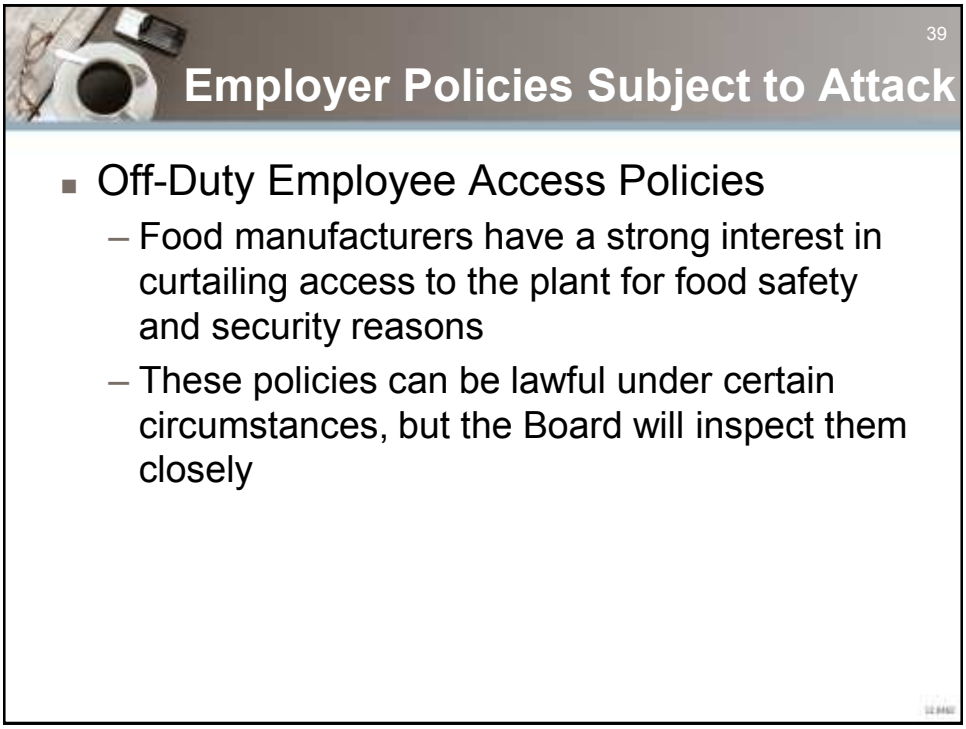
Employer Policies Subject to Attack
Social Media and Non-disparagement Policies
– Consider adding specific language to policy (or generally in an employee handbook): "This policy (or "this handbook") is not intended to and shall not be interpreted in such a way as to interfere with the exercise of an employee's rights under the National Labor Relations Act."
– This "safe harbor" language will make it more likely that your policy will be upheld as lawful (and that an employee who is fired for blabbing or lying about the company will stay fired).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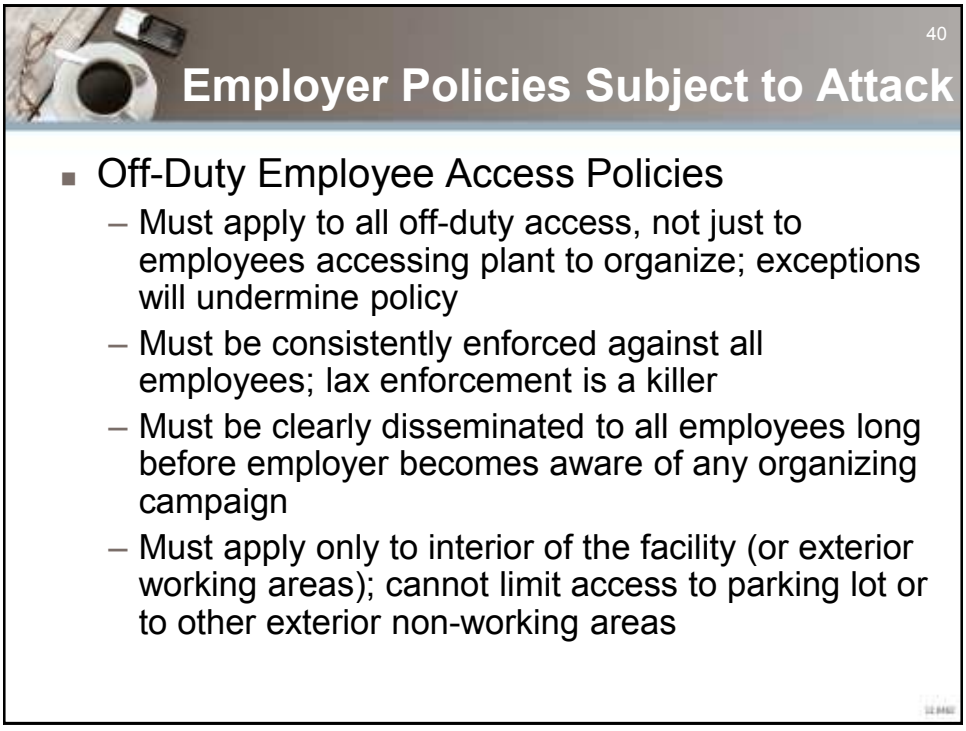
Employer Policies Subject to Attack
Off-Duty Employee Access Policies
– Food manufacturers have a strong interest in curtailing access to the plant for food safety and security reasons
– These policies can be lawful under certain circumstances, but the Board will inspect them closely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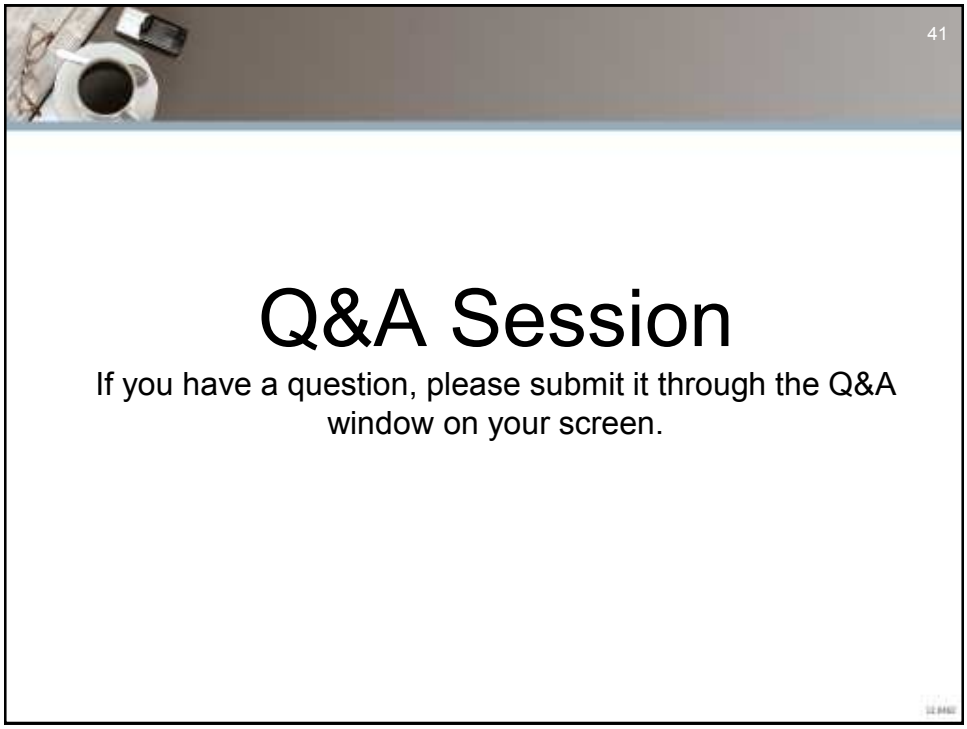
Employer Policies Subject to Attack
Off-Duty Employee Access Policies
– Must apply to all off-duty access, not just to employees accessing plant to organize; exceptions will undermine policy
– Must be consistently enforced against all employees; lax enforcement is a killer
– Must be clearly disseminated to all employees long before employer becomes aware of any organizing campaign
– Must apply only to interior of the facility (or exterior working areas); cannot limit access to parking lot or to other exterior non-working areas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Q&A Session
If you have a question, please submit it through the Q&A window on your screen.