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The Boomerang Returns: Rapidly Changing Labor Laws Impacting Private, Public, Union, and Non- Union Employers

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Meet Your Next Speakers



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Today, we'll cover:
NLRA Developments
Public Sector Issues
Whither Organized Labor?



NLRB Key Players

Mark Gaston Pearce (D)

Lauren McFerran (D)

William Emanuel (R)

Marvin Kaplan (R),

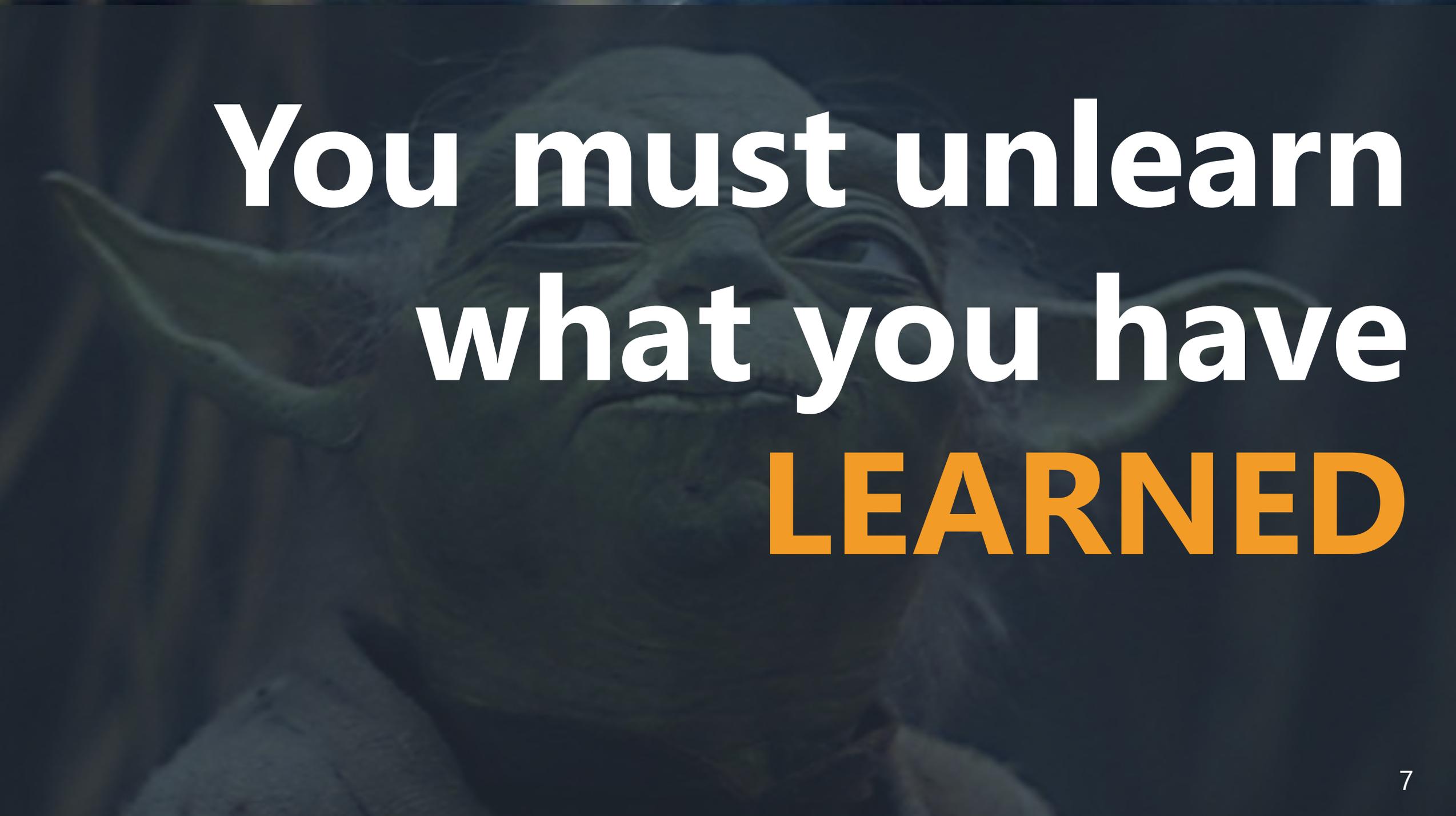
Chairman

5th Member TBD

(John Ring?)

General Counsel

Peter Robb (R)



**You must unlearn
what you have
LEARNED**

What Has Changed: Handbooks



***Boeing* - New test for reviewing facially neutral work rules will consider**

- **Impact of the rule on Section 7 rights**
- **Employer's reason(s) for the rule**

“Boeing Buckets”



Bucket #1 = lawful

- **The rule, when reasonably interpreted, does not interfere with employee rights, or**
- **The rule’s justification outweighs the potential adverse impact**



Bucket #2 = rules that “warrant individual scrutiny”



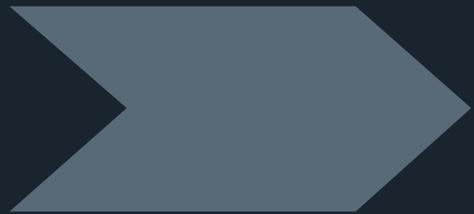
Bucket #3 = unlawful

What Has Changed?



Bucket #1

- Boeing no-camera rule
- Significant security and other business reasons
- “Harmonious interactions/workplace civility”



Bucket #3

- “Can’t discuss wages”

Post- *Boeing*

You be the judge...

- Will not pursue, assist or participate in any claim against employer
- Must not disclose confidential information concerning...employees
- Will not make false, disparaging, or derogatory statements

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Post- *Boeing*

- **Greater certainty?**
- **Still must apply a test, but likely to be applied with a greater appreciation for employer interests**
- **Very difficult issue; 30+ cases percolating through NLRB process**

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What Has Changed?



Unit Determination

- No more “overwhelming community of interest” test (*PCC Structurals*)



Impact

- Balanced review of proposed units
- Diminished opportunity for cherry-picked units

What Has Changed?



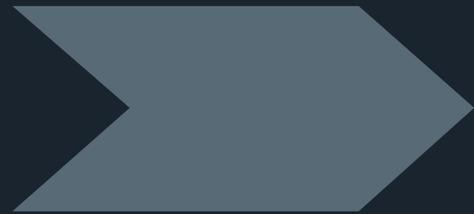
The dynamic status quo

- **Context**
 - **Contract expires**
 - **Must maintain the status quo**
 - **What is the status quo?**
 - **Best example – annual changes to health care plan**

What Has Changed?



Old Rule: Any decision involving employer discretion is automatically a change to the status quo (*DuPont*)



New Rule: Post-expiration unilateral changes consistent with past practice are lawful (*Raytheon*)

Raytheon Impact

Impact

- Hugely important for unionized employers
- Eases pressure on employer to reach a deal if they can act unilaterally
- But...may lead to litigation over what is the past practice

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Joint Employer

What is your
favorite memory of
the *Hy-Brand* era?

From *BFI* to
Hy-Brand and back
again...

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What Has Changed?

Impact

- **Until we meet again...**
 - *Hy-Brand* a better platform from which to argue separate employers
 - Likely to return
- **Back to BFI**
 - **Joint employer status can be based on the mere existence of:**
 - reserved joint control
 - indirect control, or
 - control that is limited and routine
- **Shines the light on the politics of the NLRA**

What Has Changed?

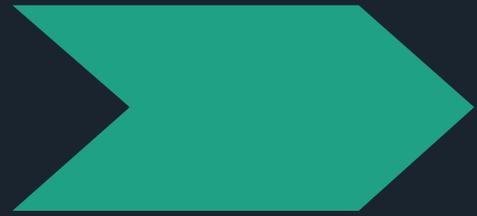


**Default language in
settlement agreements**

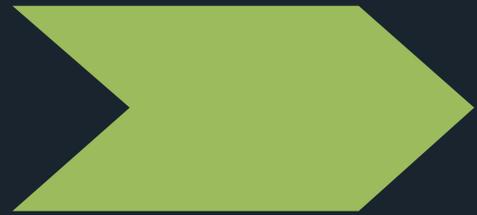


ALJ approval of settlements

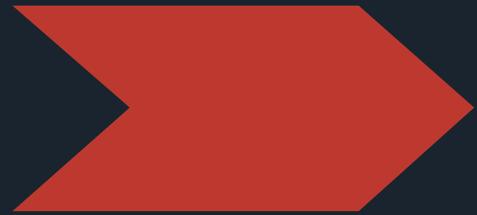
What does all of this mean for **employers**?



Balanced consideration of all parties' interests



Fewer ULP cases (maybe)



Expanded opportunities to defend, settle, and shape a settlement agreement

What *Will* Change?*

Protected concerted activity

- Only one employee with skin in the game
- Vulgar, obscene behavior

Employee use of/access to employer property

- E-mail
- Picketing on property

“Discipline” bargaining, wage increases during first-time negotiations

Quickie election rule?

*Predictions not guaranteed

A Few Thoughts on Google

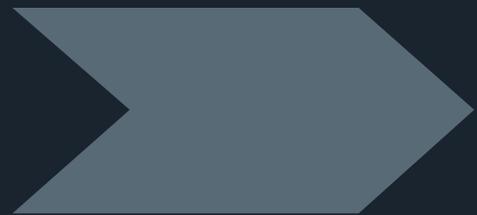


Employee “gender disparity” memo

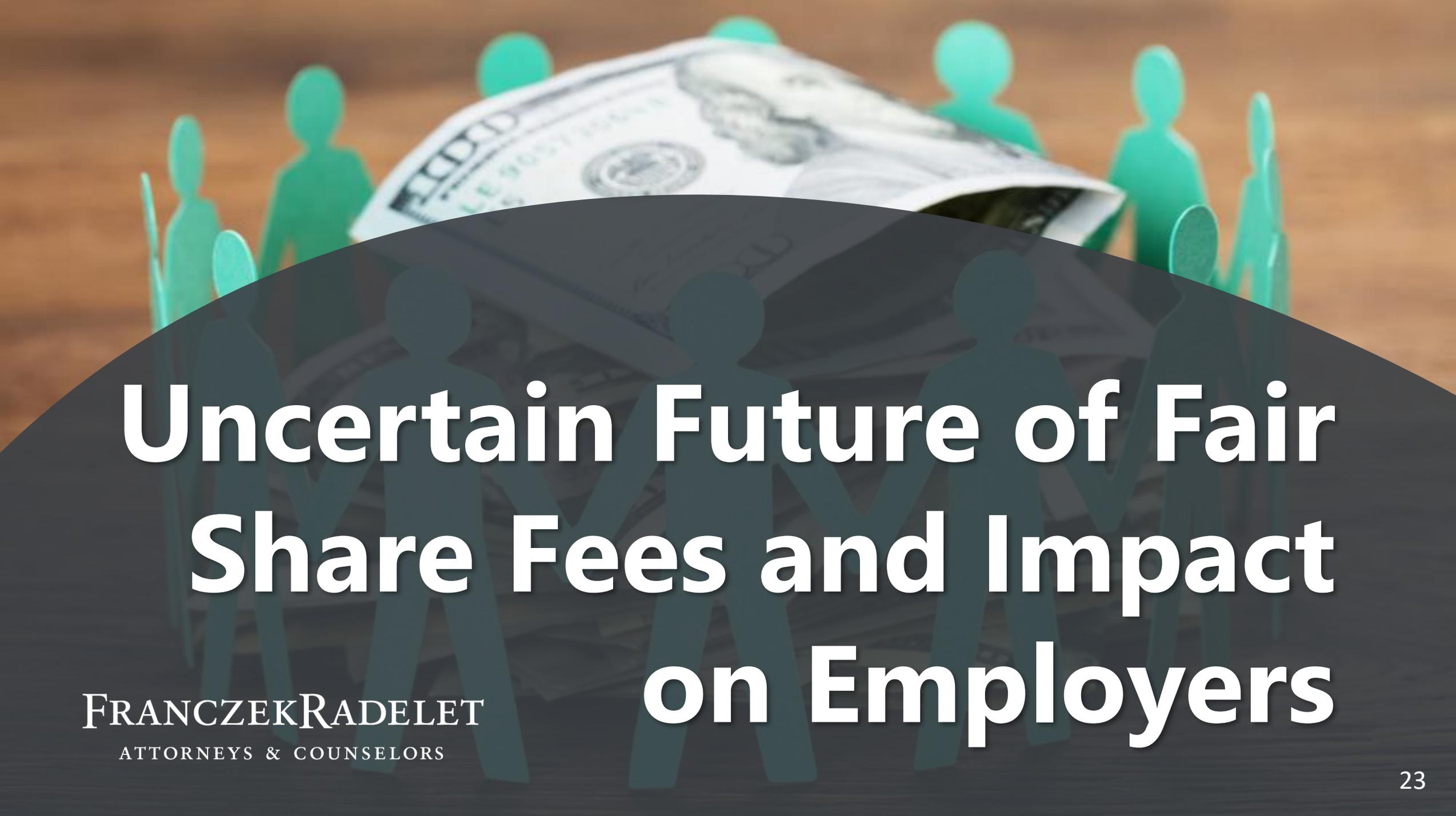
- **Innate disparities in, among other things, intellect, explained why more males in high ranking positions; opposed diversity policy**



**Google fires the employee
ULP follows; case dismissed**



Why does Google prevail?



Uncertain Future of Fair Share Fees and Impact on Employers

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Fair Share Fees



1

Janus v. AFSCME, Council 31,
decision expected Summer 2018

2

**May overturn law requiring
non-union members from
paying a fair share fee**

3

**Many current CBAs provide fair
share fees**

4

Impact on public employers

- **Mid-term bargaining**
- **“Members Only” proposals**

Beyond *Janus*...



What's new at the ILRB?



What's new at the IELRB?



***Palatine* Strike Injunction
case**

Whither Organized Labor?

- **Whither**
 - Adverb; to what place or state
- **Tough times – Elections and membership** ↓
- **Avoid the NLRB**
 - Can't bludgeon employers with handbooks
 - More difficult to shape unit
 - Private sector higher ed unions sprinting away from NLRB
- **A level playing field in negotiations, but...**
 - Expect unions to demand tax cut \$\$\$
 - Union leverage in a tight market (upward wage pressure)

Whither Organized Labor?

What's a union to do?

- **Politics: elect sympathetic candidates**
 - **Public sector unions spent \$17.7 million in 2016**
- **Corporate campaigns**
- **West Virginia Teacher Strike**