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Hot Topics in Business Law
Business Law Institute, Hamline School of Law
Employment Law
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NLRB's FOCUS ON CONCERTED & PROTECTED ACTIVITIES

- The National Labor Relations Act (NLRA) applies to private sector employers regardless of whether they are union or nonunion.
- Under §7 of the NLRA, employees have the right "to engage in other concerted activities for . . . mutual aid or protection[.]"

- This issue is implicated anytime an employer wishes to discipline or discharge an employee for engaging in <u>conduct that is in protest of</u> <u>or seeks to improve the employee's wages, hours, or other terms and conditions of employment</u> (e.g., working conditions, overtime, health insurance, retirement benefits, personnel policies, wage rates, supervision, etc.)
- The issue is also implicated to the extent that the employer limits or prohibits an employee from engaging in such activities.
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- It is a violation of the NLRA to discipline an employee for engaging in conduct that is concerted and protected.
- All employees have this right <u>not</u> just employees represented by a union.



2013 PERFECT STORM

- 1. NLRB efforts to publicize employee rights.
- Pro-labor Board expanding protections.
- 3. Knowledge gap among business professionals, HR practitioners, and employment attorneys.
- Explosion of employee activities on social media.



NLRB Website

On 6/18/12, the NLRB launched a webpage devoted to concerted and protected activity.

– www.nlrb.gov/concerted-activity



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Protected Concerted Activity

The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court. Recent cases involving a range of industries and employees are highlighted on the map below; please hover over a pin for a summary or click and the full story will appear below.



Questions?

Whether or not concerted activity is protected depends on the facts of the case. If you have questions, please contact an Information Officer at your nearest NLRB Regional Office, which you can find on this page or by calling 1 -866-667-NLRB. The Information Officer will focus on three questions:

Is the activity concerted? Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.

employees?

Will the improvements sought - whether in pay, hours, safety, workload, or other terms of employment - benefit more than just the employee taking action? Or is the action more along the lines of a personal gripe, which is not protected?

Is it carried out in a way that causes it to lose protection? Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause concerted activity to lose its protection.

Section 7

"Employees shall have the right to selforganization, 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 irpose of collective bargaining or

The NLRB's website educates viewers:

"The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away."

NLRB Mobile App

On 8/30/13, the NLRB released a mobile app. The app contains the following information under the heading for "Employees:"

"Federal law protects employees engaged in union activity, but that's only part of the story. Even if you're not represented by a union — even if you have zero interest in having a union — the National Labor Relations Act protects your rights to band together with coworkers to improve your lives at work."

NLRB mobile app, continued

"You have the right to act with coworkers to address work-related issues in many ways. You can circulate a petition asking for better hours, participate in a concerted refusal to work in unsafe conditions, openly talk about your pay and benefits, and join coworkers in talking to the media about problems in your workplace, among other things. . . ."

Protected activity

- Concerted protests or complaints to state and federal agencies, to legislators, to vendors/customers, or even to the local newspaper.
- Concerted protests or complaints to the employer about wages, hours, or working conditions.
- Concerted refusals to work (*i.e.*, strikes) (in the absence of an applicable no-strike clause).
- **Discussion concerning terms and conditions of employment amongst employees. **

Concerted activity

Collective action is <u>not</u> always necessary.

Example from Minneapolis, spring of 2013:

As reported in the media, a local retailer terminated five employees, allegedly in retaliation for presenting a petition that requested an increase in the starting wage to \$9.00, a \$1.00 across-the-board raise, and an increase in the top pay rate from \$10 to \$13.50. The NLRB Regional office found merit to their charges alleging that the terminations were in retaliation for engaging in concerted & protected activity.



Other examples:

Three employees discuss with each other their last wage increases and their last written warnings.

A group of non-union employees walks off the job because of low pay and poor working conditions.

A single employee drafts a petition requesting that the employer relax the dress code, and she asks for employees to support her by signing the petition.

Other examples:

An employee posts a flyer on the bulletin board in the break room, complaining about the company's decision to require that employees pay more out-of-pocket costs for their health insurance. The poster states that everyone should call or e-mail the CFO to complain.

After two employees meet with the human resources manager and their supervisor to protest the new, higher productivity standard, one of those employees writes a letter to the CEO, complaining that the employer is "heartless" and "crazy" for expecting employees to keep-up with this "completely unreasonable" standard.

Other examples:

A single employee complains at a staff meeting that the staff now must spend twice as much time cleaning because of the low-quality (and cheap) cleaning products that the company has switched-to, and asks his coworkers to agree and chime-in.

Three employees sign a letter to the editor, which is published in the same newspaper that recently named their employer a "Top Place to Work." The letter complains that year after year, they must pay more for insurance, while the greedy CEO has free parking and an employer-paid health club membership.

EXPANSION

1. It is now unlawful to terminate an employee as a "preemptive strike" to prevent her from engaging in concerted and protected activity, even if no such activity has occurred up to that point.

Parexel Intl., LLC, 356 NLRB No. 82 (2011)

- 2. A mere conversation about a "vital" term and condition of employment is "inherently concerted" such that contemplation of group action is not required.
 - -- Wages, job security, work schedules, and ????? <u>Hoodview Vending Co.</u>, 359 NLRB No. 36 (2012)



EMPLOYER INVESTIGATIONS

- In general, an employer may not prohibit employees from disclosing information about an ongoing investigation into employee misconduct.
- However, depending upon the particular situation, the employer may have a legitimate business justification that privileges the employer to instruct witnesses that they are prohibited from sharing anything regarding the investigation to others. This is a case-by-case inquiry.
- This is not a new rule, but a 2013 NLRB memo brought the issue to the forefront.
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What about social media postings (Facebook, Twitter, YouTube, etc.)?



SOCIAL MEDIA

- There are NLRB reports and Board cases, analyzing:
 - whether social media policies were lawful or not, and/or
 - 2) whether the employer acted unlawfully by disciplining or discharging an employee in response to that employee's use of social media.

<u>Hispanics United of Buffalo, Inc.</u>, (NLRB 2012)

- Lydia criticized the work of her co-workers by text message.
- In response, one employee posted on Facebook:
 "Lydia... feels that we don't help our clients enough...I about had it! My fellow coworkers how do u feel?"
- 7 EEs posted responses, generally (and in colorful language) defending themselves.
- Supervisor fired 5 EEs for "bullying and barassment" Lydia on the basis of their posts.

Hispanics United of Buffalo, Inc., (NLRB 2012)

- Board found non-union employer's terminations of the 5
 EEs was unlawful.
- The postings were concerted, because it
 was "implicitly manifest" that the
 co-workers' postings had the "clear
 'mutual aid' objective of preparing [the]
 coworkers for a group defense to [Lydia's]
 complaints."



- Board did not find the posts "bullying" or "harassing."
- Board ordered reinstatement and full backpay.

Karl Knauz BMW, (NLRB 2012)

- Post #1: Promo Event
 - Salesman posted photos and comments criticizing the food.
 - "No, that's not champagne or wine, it's 8 oz. water."
 - During earlier meeting, EEs raised concerns about food.
- Post #2: Pics of car belonging to sister dealership in pond.
 - Posted pics with captions: "This is your car: This is your car on drugs" and "Oops."



Protected Concerted Activities

Karl Knauz BMW, (NLRB 2012)

- Post #1 (re: food) may have been protected.
- Post #2 (re: accident) was <u>not</u> protected.



- Because the EE was fired for Post #2 (and not Post #1),
 the employer did not violate the NLRA.
- Board found dealership's "Courtesy Policy" unlawful.
 - Policy was overbroad because it banned "disrespectful" conduct and language that might injure the "image or reputation" of the employer.

Bettie Paige Clothing, (NLRB 2013)

 EEs complained to the owner about the management style of the store manager, and about safety concerns because the store was open later than others.



- After the manager got upset, two break employees wrote on Facebook that the manager "needs a new job" and is "immature; that she "makes our lives miserable;" and that no one was doing anything about their concerns.
- The Board held that the terminations were unlawful, finding that the Facebook postings by themselves were concerted and protected.

SOCIAL MEDIA

The NLRB Acting General Counsel has gone on record to green light a Wal-Mart policy on social media. The Wal-Mart policy is appended to the third report (OM 12-59).

www.nlrb.gov

Cases & Decisions → Research →

Operations-Management Memos →

OM 12-xx "Apply" → OM 12-59



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