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Employee Conduct May Be Protected Even Without a Union!
Employers Seeing Significant Protected Concerted Activity in the Pandemic

By Nicole Elgin

The pandemic has brought immediate attention to countless legal issues, including employees exercising the right to engage in protected concerted activity under the National Labor Relations Act ("NLRA"). While the NLRA provides union rights in the private sector, it also provides employees with certain protections even where the workplace is not unionized. At the beginning of the pandemic, headline after headline showed employees engaged in protected concerted activity in order to improve working conditions.

There have been safety strikes, demands for hazard pay and improved working conditions, and now demands for priority vaccination treatment. Employers who discipline employees for protected concerted activity do so at their own peril. The National Labor Relations Board ("NLRB") can even order an employer to reinstate an employee who was fired for protected activity.

Protection Applies to Non-Union Workplaces

The concept of protected concerted activity is not limited to unionized workplaces. The "protection" for this concerted activity stems from the rights under the NLRA, which applies to most private sector employers. As Section 7 of the Act explains, "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 …."[1] That language does not require that the employer or employee already have a collective-bargaining relationship. All too often, nonunionized employers are unaware that these federal rights apply to their employees' conduct.

Employee Conduct Must Be Concerted

To understand how protected concerted activity has been implicated throughout the pandemic, it is important to revisit its definition. Section 7 of the NLRA provides employees the right "to engage in other concerted activities for the purpose of … other mutual aid or protection."[2] To qualify as "protected" conduct, the employee first must engage in conduct with, or on the authority of, other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action."[3]

Evidence of group activities might include "prior or contemporaneous discussion of the concern between or among members of the workforce."[4] Alternatively, an individual employee's efforts to

[1] 29 U.S.C. § 157.
[2] *Id.*
[3] https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights (last visited Feb. 4, 2021).
[4] 367 NLRB No. 68 (2019).

"induce group action" can also qualify as protected concerted activity. If the employee's conduct is trying to induce group action, it must appear at the very least, that the individual engaged in conduct "with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees."[5] However, if the employee's activity "consists of mere talk" and "looks forward to no action at all, it is more than likely to be mere 'griping'" and therefore not concerted.[6]

In light of this definition, it is clear that complaints made together by two or more employees regarding workplace concerns such as health and safety matters in the pandemic would be concerted activity. However, if an individual employee is the one raising the workplace safety or health concern, it may not necessarily qualify as protected concerted activity under the current legal framework.

Employee Conduct Must Seek Mutual Aid or Protection

Second, for employee conduct to be protected under the NLRA, it must seek to improve "their lot as employees" by being related to the employees' own working conditions.[7] Simply protesting a noble cause, without tying it back to one's working conditions, is outside the protections of Section 7 if that activity lacks a more "immediate relationship to employees' interests as employees."[8]

For example, in the context of medical facilities, the NLRB has repeatedly held that employee concerns about the quality of care or the welfare of patients are not concerns of "mutual aid or protection" under Section 7.[9] In another case, employees complained about planned policy changes and that the competence of management threatened the quality of care, quality of the program, and children's welfare.[10] The NLRB found that even though the employees' activity was concerted, it was not protected because "employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope of [Section 7]."[11]

These contours of the definition of protected concerted activity show that employees may engage in concerted activity related to the pandemic, but if that activity does not seek to improve their lot as employees, it may not be protected activity under the NLRA.

If employees are engaging in this type of workplace conduct, we suggest employers check in with labor counsel before deciding how to respond. For questions about employee conduct in the workplace, contact labor and employment attorney Nicole Elgin at nelgin@barran.com.

[5] *Id.* (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)).
[6] *Id.*
[7] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).
[8] *Id.* at 557-58.
[9] *Orchard Park Health Care Center, Inc.*, 341 NLRB 642 (2004).
[10] *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980).
[11] *Id.* at 41.