The Labor Board Is Giving Employees More Rights To Complain

Insights
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Section 7 of the National Labor Relations Act (NLRA) grants employees the right to "engage in... *concerted* activities for the purpose of collective bargaining or other mutual aid or protection." (emphasis added). This broad statutory language leaves room for subjective interpretation, and, over the years, the courts and the National Labor Relations Board (NLRB) have refined the standard for what conduct is considered "concerted."

As explained by the current Chair of the Labor Board, Wilma Liebman, despite years of precedent dictating whether employee activity is truly "concerted," the public should expect "policy oscillations" resulting from changes in the political makeup of the Board. In several recent cases, the Obama Labor Board has shown a willingness to expand the definition of concerted activity to protect employees and labor unions. Employers (both organized and non-union) should take notice of the dramatic shift in the Labor Board's policies. Act now to avoid being caught in these changing tides.

Two Recent Cases Have Expanded the Concept of Concerted Activity
In the 1980s, the Supreme Court confirmed that a single employee acting alone could be engaged in concerted activity and thus could be protected under certain circumstances. Soon afterward, the Labor Board articulated the standard for determining when a single employee was engaged in concerted activity to be those times when the individual was seeking "to incite, induce or prepare for group action" or to bring group complaints to the employer's attention.

Two cases decided by the Obama Labor Board this year demonstrate how the Obama Labor Board is expanding the concept of concerted activity. *Parexel International, LLC*, decided in January 2011, involved an employee who complained to a coworker about her belief that certain employees were paid higher wages and given preferential treatment. The employee told her supervisor of her complaint, who in turn reported it to Human Resources. Later, the Human Resources Director asked the employee about the nature of her complaints. During that conversation, the Human Resources Director asked if the employee had mentioned her complaints to any other employees, and the employee said she had not. Six days later, the employer terminated the complaining employee.

An Administrative Law Judge (ALJ) ruled that the employer did not violate the law by discharging the complaining employee. His decision (that the complaint was from a single employee, acting alone, and therefore not "concerted") was based on existing precedents. But in a 2-1 decision on review, Chairman Liebman and controversial Member Craig Becker ruled that the employer violated

review, Chairman Liebman and controversial Member Craig Becker ruled that the employer violated the NLRA. They reasoned that the discharge of the employee for expressing her individual complaint was "a pre-emptive strike to prevent her from engaging in activity protected by the [NLRA]." The Board continued, stating that "[i]f an employer acts to prevent concerted activity – to 'nip it in the bud' – that action interferes with and restrains the exercise of Section 7 rights and is unlawful."

The Board decided a similar case, *Wyndham Resort Development Corp.*, in March. In that case, the employer maintained a "resort casual" dress code under which male employees could wear untucked Tommy Bahama shirts. An employee returned from vacation and heard a rumor about a new dress code that required employees to tuck in their shirttails. Prior to an employee meeting, the employee confronted his supervisor and complained about the new dress code policy. He also complained that the company usually put policy changes in writing and he had not seen a memo on the new policy. The employee said he "might not want to tuck in my shirt" and "I did not sign up for this crap." The supervisor then took the employee into his office, with another employee witness, to scold him and "invited" him to quit. A few days later the employer simply issued the complaining employee a written warning.

An ALJ ruled that the employee's protest of the dress code was not concerted because he acted independently of other employees, in his own self-interest and without a common goal. However, in another party-line split decision, Chairman Liebman and Member Becker rejected the ALJ's decision and held that the individual employee's actions were concerted and thus protected, because they occurred *in front of other employees* – even though he had not solicited his peers' input on the policy before voicing his complaints.

Watch Your Step

The shifting Labor Board policies announced in these two recent cases underscore the need for employers to take time to review *all* of their work rules to make sure they could withstand the scrutiny of the current lineup. Work or behavioral rules that may have been lawful under the policies of the Bush 43 Labor Board may be deemed unlawful by the current Labor Board.

Chairman Liebman has suggested that employers should add language to their employee handbooks that makes it clear that the employer's work rules and policies are limited and not intended to violate employee rights under Section 7 of the NLRA. We agree that such language may be appropriate, at least in the context of rules addressing topics such as solicitation or distribution, off-duty access to employer property, disclosure of confidential information, contact with government agencies, and non-disparagement of the employer.

You should also establish precise grievance or problem-solving procedures. Educate your employees about the proper channels and methods of raising complaints. When employees raise complaints, consider whether the act of raising the complaint is subject to the protections of Section 7 of the NLRA. Consider adding the phrase "any protected concerted or union activity" or some similar variation to your standard nondiscrimination or Equal Employment Opportunity (EEO) policies.

Under the previous NLRB, employers clearly had more latitude to discipline or discharge individual employees who complained. But with these policy changes and the dramatic rise in claims of retaliation under various other laws, employers should be especially cautious when disciplining or discharging complainers or whistleblowers.

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