Labor Board Signals Continued Expansion of Employee Rights: Your Questions Answered

Insights
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A recent Advice Memo issued by the Office of the General Counsel of the National Labor Relations Board (NLRB) provides all employers – union and non-union alike – with yet another warning that more of your employment decisions and workplace policies could be scrutinized by government officials. The under-the-radar memo issued on June 30 advises local Board agents to pursue unfair labor practice charges against a national retailer for alleged violations of Section 7 of the National Labor Relations Act (NLRA) for prohibiting an employee from displaying a Black Lives Matter slogan on their work apron. This case, resurrected from 2021, provides yet another example of why employers need to proceed cautiously whenever disciplining workers or crafting company policies. Employers are bound to have questions about this memo and whether employees' conduct constitutes inherently "protected concerted" activity – and we have answers.

What is the inherently "concerted activity" doctrine?

Section 7 of the NLRA guarantees employees the right to self-organize, form and join a labor organization, and engage in other concerted activities for purposes of collective bargaining or other mutual aid or protection. These rights exist in both unionized and non-unionized workplaces.

Under Section 7, concerted activity is conduct that is "engaged in with or on the authority of other employees." It includes statements by individual employees for the purpose of initiating, inducing, or preparing employees for group action. Certain topics that are considered "inherently" concerted (regardless of whether they expressly contemplate group action) include discussions about higher wages, changes to work schedules, and job security.

What gave rise to the charges in this case?

In the case leading to the June 30 memo, the employer maintained a company-wide dress code policy that said, "the apron is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters."

Starting in August 2020, an employee donned an apron prominently displaying a Black Lives Matter slogan. Six months later, the employee and a small group of coworkers made complaints that they were subjected to racial harassment at work.

The employee emailed company officials requesting further action to protect employees of color. According to the Advice Memo, the company subsequently advised the employee that his apron was in violation of the dress code policy and directed him to either remove it or resign.

What did the local NLRB Region find?

The Region initially concluded that the employee's actions were a "logical outgrowth" of ongoing concerted activities culminating in a group request for protection from alleged racial harassment. It therefore concluded that the directive from the company violated the employee's Section 7 rights.

What did the General Counsel's Office subsequently find?

The Advice Memo, which is not considered legally binding, found that "employee discussions in the workplace regarding racism should be deemed inherently concerted because systemic racism, including an employer's racial discrimination or racial harassment, and/or tolerance of such discrimination or harassment, necessarily implicates significant terms and condition of employment and is of vital importance to employees." Most importantly, the General Counsel's office urged the NLRB to enlarge the scope of the inherently concerted doctrine beyond traditional conversations between employees to include wearing slogans or buttons.

What does this mean for employers?

While the advice memo is not binding, it is yet another sign of the Board's continued expansion of Section 7 rights.

This is not first time the General Counsel's office has urged the Board to find that discussions on racial discrimination and harassment are "inherently concerted" activity. In 2021, the General Counsel's office foreshadowed this policy shift by proclaiming certain conduct is "inherently concerted" even when not "explicitly connected to workplace concerns." This time, however, the General Counsel's Office went one step further urging "inherently concerted" activity to include something even less than a discussion.

It also shows that both unionized and non-union employers should approach workplace issues involving race (and likely other protected categories such as gender and age) with a broad-based perspective that includes NLRA principles. The overlap between Title VII and the NLRA is becoming increasingly prevalent, and there is no end in sight to the General Counsel's campaign to expand the boundaries of protected concerted activity.

What should employers do?

Allegations under Section 7 are on the rise from a variety of stakeholders, ranging from employees to labor organizations – and even plaintiffs' lawyers. You should take caution and consider the NLRA when employees raise concerns or oppose workplace harassment and discrimination – and even

general discussion on those issues. You should also train human resources personnel and management on how best to identify potential concerted activity at the earliest stages, while exercising caution to refrain from taking such activity into account when making employment decisions.

Further, when read in conjunction with the NLRB decision earlier this month that lowered the legal standards for whether workplace misconduct policies violate federal law, you would be wise to evaluate your current workplace policies for compliance with current interpretations of NLRA doctrine. Otherwise, you could find yourself facing allegations of infringement on Section 7 rights.

Conclusion

We will continue to monitor developments as they unfold. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. Should you have any questions on the implications of these developments and how they may impact your current workplace rules and policies, please do not hesitate to contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Group for additional guidance.

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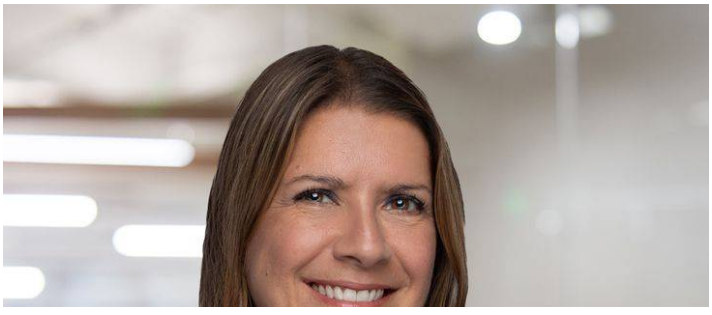

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