Labor Board Once Again Shifts the Scales to Ensure More Employee Conduct is Considered Protected Concerted Activity

Insights
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The National Labor Relations Board has once again overturned employer-friendly precedent by making it more likely that individual employee gripes – whether in a union or non-unionized workplace – will be deemed protected concerted activity under Section 7 of the National Labor Relations Act. In the August 25 *Miller Plastics* decision, the Board overruled *a 2019 decision that* established a checklist of easy-to-follow factors to determine whether complaints raised by an individual are tantamount to group activity protected under the NLRA. The Board found the checklist unduly narrowed the scope of legally protected conduct, returning to a broad and ambiguous standard where the question of whether an employee has engaged in concerted activity is a factual one based on the "totality of the record evidence." What do employers need to know about this latest decision tilting the playing field further against management and what should you do about it?

Employee Complains About the Company's Decision To Remain Open During the Pandemic

The employer in the *Miller Plastics* case, a storage products manufacturer in Pennsylvania, terminated Ronald Vincer for performance reasons and for violating company policy shortly after he raised concerns during a group meeting about the company's decision to remain open during the COVID-19 pandemic. The Board found that the termination was directly related to his expression of those concerns.

At issue was whether the conduct was both "concerted" and protected under the NLRA. Although the Board found the termination unlawful under the checklist of factors promulgated by the 2019 *Alstate Maintenance* decision, it also decided to overrule that decision reasoning that it improperly narrowed the scope of protected concerted activity.

The Shifting Definition of Protected Concerted Activity

In the mid-1980's, the Reagan-era Board established the standard for determining whether activity is "concerted" in a series of cases known as the *Meyers Industries* decisions. In doing so, the Board held that an employee must be engaged with or on the authority of other employees to act concertedly, and not solely on behalf of himself. The Board went on to find that concerted activity encompasses only those circumstances in which individual employees seek to initiate, induce, or prepare for group action, or in the alternative where they bring group complaints to the attention of

management. Personal gripes or grievances (as opposed to group complaints) failed to satisfy this standard.

In 2011, however, the Obama-era Board departed from this standard in *WorldMark by Wyndham*. It found that an employee who lodged a complaint in a group setting – without having previously agreed to act in concert with others – was nonetheless protected simply because of the group nature of the activity. Specifically, the NLRB held that an employee who protests publicly in a group meeting is engaged in initiating group action as a matter of law.

In *Alstate Maintenance*, the Trump-era Board overruled *that standard* and explained that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun." Contrary to its finding in *WorldMark by Whyndham*, the majority maintained that "the fact that a statement is made at a meeting, in a group setting, or with other employees present will not automatically make the statement concerted activity." The Board went on to establish a five-factor checklist to evaluate whether concerns raised by individual employees in group settings amount to protected concerted activity.

A Return To A Totality Of The Circumstances Standard

But in the *Miller Plastics* decision announced late last month, the Board took issue with the *Alstate Maintenance* test, finding it "unduly restrictive." The Board explained that it wanted to promulgate a holistic approach centering on a totality of circumstances involved to assess whether individual conduct was protected. *Alstate Maintenance,* on the other hand, created a test that was deemed too restrictive to delineate the boundaries of concerted conduct. The Board therefore took the opportunity to overrule *Alstate Maintenance* altogether, returning to the broader "totality of evidence standard."

What Does This Mean for Employers?

This decision represents another setback for employers, who once again confront the possibility of an unfair labor practice complaint for discipline issued against the backdrop of individual gripes. The "totality of the record evidence" test means exactly what it states: a thorough and detailed analysis of the facts is necessary before determining if an employee engaged in protected concerted activity. This will undoubtedly bring a broader spectrum of employee conduct within the protection of the NLRA.

If you are unsure whether employee conduct satisfies the "totality of the record evidence" test, we recommend consulting with your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group before taking any adverse action, or if you have questions about applying this new standard. We will continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary, so you should sign up for Fisher Phillips' Insight System to ensure you receive updates directly to your inbox.

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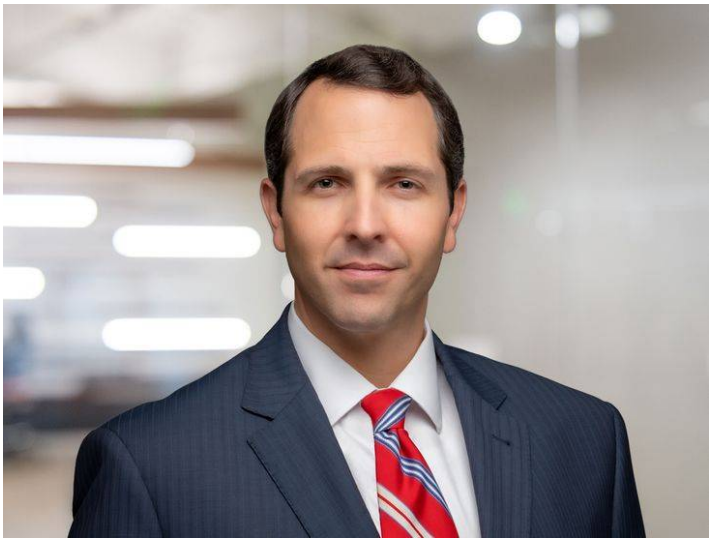

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