Legal Update Article

Labor Board: Employee Protected Concerted Activity Determined by Totality of the Circumstances

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The National Labor Relations Board has returned to the "totality of the circumstances" test for determining when individual employee action constitutes protected concerted activity. ***Miller Plastic Products, Inc.,*** 372 NLRB No. 134 (Aug. 25, 2023). Employee activity will be assessed under the previous tests of *Meyers Industries Inc.,* 281 NLRB 882 (1986), using a holistic, fact-based approach to determine whether individual complaints or protests have a link to group action.

The decision overturns the Trump-era test that introduced a five-factor test to assess when single employee activity is protected under Section 7 of the National Labor Relations Act. *Alstate Maintenance, LLC,* 367 NLRB No. 68 (2019).

The decision broadens the protections for employees seeking to spur organizing activity in the workplace. The decision applies retroactively.

Background

Section 7 of the Act establishes employees' right to engage in protected concerted activities. Covered conduct must be "both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" Citing *Fresh & Easy Neighborhood Market, Inc.,* 361 NLRB 151 (2014). Employers can commit an unfair labor practice (ULP) if they "interfere with, restrain, or coerce employees in the exercise" of these protected rights.

The Board established a test for assessing concerted activity in *Meyers I,* 268 NLRB 492 (1984), finding that employee activity is concerted when it is "engaged in with or on the authority of others, and not solely by and on behalf of the employee himself." Later, in *Meyers II,* 281 NLRB 882 (1986), the Board clarified that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." The Board explained that the definition of concerted activity is not exhaustive and whether an employee engaged in it is "based on the totality" of the evidence.

Prior Standard Under *Alstate Maintenance*

In 2019, the Board set out the five-factor test for determining whether there is a reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce, or prepare for group action. The factors are:

1. The statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of

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employment;

2. The decision affects multiple employees attending the meeting;

3. The employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how the decision has been or will be implemented;

4. The speaker protested or complained about the decision's effect on the workforce generally or some portion of the workforce, not solely about its effect on the speaker themself; and

5. The meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

The Board, therefore, clarified the specific circumstances under which a complaint made by an individual employee in front of a group was considered concerted activity under the Act.

Miller Plastic

In *Miller Plastic,* an employee claimed he was terminated after questioning the employer's COVID-19 protocols and the employer's decision to remain open during an all-employee meeting. The Board Region issued a complaint against the employer, alleging the employee was terminated for engaging in protected concerted activity. The administrative law judge found under *Meyers* that the employee's COVID-19-related complaints constituted protected concerted activity, rather than simply "mere individual 'griping.'" On appeal, the Board general counsel argued that *Alstate* should be overruled as the "unduly restrictive" list of factors "improperly narrowed the definition of concerted activity" established in *Meyers.*

Finding against the employer and overruling *Alstate,* the Board explained that the "question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence" and should not be limited by what it termed *Alstate*'s "unduly cramped" list of factors. The Board then highlighted examples of circumstances where the expanded definition of concerted activity would apply.

For example, employee activity could be concerted through "spontaneous, informal means," regardless of whether a statement was made in an employer-initiated meeting to discuss terms and conditions of employment. Employee questions not intended to protest or complain also could be protected, as could conduct arising from an employee addressing an employer's decision in a meeting even if they had prior opportunities to discuss the issue with the group. Errant remarks also could be protected depending on whether they induced future group action warranting retroactive protection. The Board further noted Section 7 "protects employees who bring a group complaint to the attention of management or make an explicit or implicit call to group action. It does not impose artificial limits on when and how employees engage in concerted activity."

Lastly, the Board ordered the employer to compensate the employee for "direct or

foreseeable pecuniary harms" pursuant to its 2022 *Thryv, Inc.* decision that expanded make-whole awards. The order includes "reasonable search-for-work and interim employment expenses … regardless of whether these expenses exceeded interim earnings."

Implications

The returning to the totality of the circumstances test will likely bring more employee conduct, questions, and remarks under the umbrella of protected activity. Moreover, even if an employee raises a concern with the employer and did not have the "intent to induce" concerted activity at the time, the activity still could be concerted if it later sparks group action or complaints.

The totality of the circumstances test requires a thorough and detailed analysis of the facts. Employers should weigh employment decisions that may involve protected concerted activity carefully and consult experienced labor counsel when necessary.

Please contact a Jackson Lewis attorney with any questions.