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The Right to Talk Pay: What Employers Need to Know Under the NLRA

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The Ninth Circuit issued a reminder to all employers that employees discussing wages generally qualifies as protected activity under Section 7 of the National Labor Relations Act (NLRA). Accordingly, all employers need to be aware that employees have a right to discuss pay.

It is important to remember that the NLRA covers nearly all private sector employers — not just those with unions. Non-union private sector employers must fully comply with labor law developments because all of their employees are protected by the NLRA, even in the absence of union representation.

Section 7 of the NLRA guarantees employees numerous rights, including the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or

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protection. Common examples of protected concerted activity include discussing terms and conditions of employment (including on social media), distributing materials, participating in a concerted refusal to work in unsafe conditions, talking to a government agency about problems in the workplace, speaking to media about workplace labor concerns, and employees joining together to talk directly to the employer about issues in the workplace. Employers may not understand that the protections afforded by Section 7 also apply to issues beyond union activity, and to non-unionized workplaces. Therefore, an employee does not have to be conversing about a topic that relates directly to working conditions in the traditional sense or to unions for the discussions or actions to be protected concerted activity.

In recent years, the scope of protected concerted activity has expanded beyond what many employers traditionally expect. For example, in 2022, the D.C. Circuit of the United States Court of Appeals upheld the NLRB's decision that the use of the profane phrase "whore board" was protected by the NLRA. The Court's decision does not mean using the term "whore board" in the workplace is necessarily appropriate, but it was found that the comment was protected as a lawful protest to the employer's overtime policy. The Court made a point to emphasize that the employer regularly tolerated vulgarities without imposing discipline, quoting one employee's analogy that "the plant's language could range from a G movie rating to NC-17; the use of 'whore board' rated 'PG.'" The Court found that, because the employer could not demonstrate it would have disciplined the offending employee absent his protected concerted activity, the employer violated the Act.

The bottom line is that employees have a right to discuss wages and other terms and conditions of employment. Restricting those discussions could lead to unfair labor practice charges, so it is

important that employers respect employees' Section 7 rights.

> The Ninth Circuit on Tuesday backed the National Labor Relations Board's order finding that a Phoenix apartment complex manager illegally terminated an employee for discussing his wages with colleagues, which qualifies as protected activity, rejecting the manager's argument the employee was fired because of the quality of his work.
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