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Practice Update

Protected Concerted Activity and the NLRA: When Employees Speak Up, Employers Should Slow Down

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Many employers believe that federal labor law, such as the National Labor Relations Act, only applies to unionized workforces. In reality, most private-sector non-unionized employees are protected by the NLRA too, which means employee conversations, complaints, petitions, or other shared workplace concerns may qualify as protected activity, even when there is no union, no organizing campaign, and no collective bargaining agreement.

Missteps in responding to protected concerted activity can result in unfair labor practice allegations, scrutiny of workplace policies, and remedial obligations.

What Is and Is Not Protected Concerted Activity

Section 7 of the NLRA protects employees' rights to "engage in other concerted activities for the purpose of . . . other mutual aid or protection." This protection may encompass group discussions about working conditions, such as wages, benefits, hours, and safety. In fact, even social media posts or group text messages can constitute "protected concerted activity" if they relate to shared workplace concerns.

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While there is no one-size-fits-all answer to what qualifies as “protected concerted activity,” protection generally covers employees’ collective actions, or one employee’s action taken on behalf of others, to raise concerns about workplace issues or conditions. The analysis often turns on whether the employee is raising a shared workplace concern or is trying to involve coworkers in the issue.

By contrast, a purely individual complaint may not constitute “protected concerted activity” if the employee is speaking only on behalf of themselves and is not seeking to initiate, induce, or prepare for group action. Additionally, otherwise protected activity may lose that protection if it is carried out in an abusive manner, though that standard is fact-specific based on the setting in which the conduct occurs, and employers should not assume that heated or offensive remarks made in the course of otherwise protected activity automatically forfeit the Act’s protection. Similarly, certain categories of workers, including independent contractors, supervisors (as defined under the Act), and certain agricultural and domestic workers, are excluded from the NLRA’s coverage altogether. Understanding these boundaries is important because it helps employers distinguish between situations requiring caution and those where legitimate disciplinary or corrective action remains appropriate.

Consider two similar scenarios:

- An employee walks into his supervisor’s office and says he and his coworkers believe the new schedule is unfair. The supervisor’s first reaction may be frustration, particularly if the supervisor created the schedule. In that situation, a rushed response criticizing the employee for discussing the schedule with coworkers or treating the complaint as insubordination can create risk under the NLRA if the response could be viewed as discouraging the employee from raising shared workplace concerns.

- An employee walks into his supervisor's office and says he does not like his assigned shift on the new schedule because it conflicts with his standard commute. Unlike the first scenario, this employee is not raising a concern shared by or on behalf of his coworkers. Rather, he is expressing a purely personal complaint about his own assignment. He does not reference any conversations he has had with other employees about the schedule, he does not claim that others share his dissatisfaction, and he does not suggest that the scheduling practice affects the workforce more broadly. His objection is rooted entirely in his own personal preference, and he frames it exclusively in terms of how it inconveniences him individually. Because the complaint is individual in nature, and the employee is not seeking to initiate, induce, or prepare for group action, the supervisor's response may not implicate the same NLRA concerns.

As illustrated by the two scenarios, the distinction between concerted and individual concerns matters: an employer generally has more latitude to address a single employee's individual dissatisfaction with their schedule through normal management channels without the added risk that its response could be viewed as chilling collective employee activity.

Key Takeaways for Employers

Because "protected concerted activity" can surface in routine workplace complaints, supervisors may not immediately recognize it. A measured response gives the supervisor, and by extension the employer, a better opportunity to understand the facts, evaluate the situation, and avoid a response that could be viewed as interfering with employee rights. That means thinking carefully not only about whether discipline is appropriate, but also about the employer's words, tone, documentation, and next steps.

Importantly, nothing in the NLRA requires an employer to agree with employees' concerns or prevents an employer from making legitimate business decisions. Employers retain the right to manage operations, set schedules, establish policies, and take corrective action for misconduct or performance deficiencies, provided those actions are not motivated by, or in retaliation for, employees' exercise of their Section 7 rights. The key is to ensure that the employer's response is based on legitimate, non-discriminatory business reasons that are consistently applied and well-documented.

Before responding to an employee who has raised a workplace concern, employers should pause and think through a few practical questions:

- **Could this involve more than one employee?** If so, the complaint may require extra caution.
- **Is the employee acting with or for coworkers?** Protected concerted activity may be implicated when an employee is speaking with coworkers, speaking for coworkers, or trying to involve coworkers in a workplace concern.
- **Could our response discourage employees from raising shared concerns?** Even if discipline is not on the table, employers should consider whether their words, tone, documentation, or next steps could be viewed as discouraging employees from acting together.
- **Are we restricting employee discussions?** Employers should avoid instructing employees not to discuss wages, schedules, staffing, safety, or other shared workplace concerns with coworkers, as such directives may interfere with Section 7 rights.

- **Have we documented the legitimate business reason for our response?** Employers should ensure that any adverse action is supported by clear, contemporaneous documentation of the performance or conduct issue, independent of the employee's protected activity, so the basis for the decision can withstand scrutiny.

Looking ahead, employers should train supervisors, managers, and human resources professionals to recognize when an ordinary workplace complaint may involve protected concerted activity. By slowing down, asking the right questions, and documenting the basis for the response, employers will be better positioned to manage employee concerns while reducing unnecessary NLRA risk. Proactive steps such as developing written guidance for front-line managers, incorporating protected concerted activity awareness into regular compliance training, and establishing clear internal escalation procedures can help organizations respond appropriately in the moment. Those steps may reduce the risk that a routine workplace complaint becomes a federal unfair labor practice charge.

For guidance on workplace policies or practices involving protected concerted activity, or other labor law matters, Akerman's Labor & Employment Law team is available to assist.
