PUBLICATION

NLRB Expands the Definitions of 'Protected' and 'Concerted' and Expands Coverage of the National Labor Relations Act

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On August 31, 2023, the National Labor Relations Board (NLRB or the Board) issued a pair of decisions that continue the agency's recent trend of broadening the reach of the National Labor Relations Act (NLRA). With these two decisions, the Board has lowered the bar for what is "concerted" and what is "protected" within the meaning of the NLRA. Many nonunion employers are surprised to learn that the NLRA applies to their management of their employees, particularly, the regulation of employee conduct. Since its inception, the NLRA has protected "protected, concerted activity" (PCA) aimed at addressing issues of shared concern among employees, such as safety concerns, pay issues, or even the administration of existing work rules.

These decisions are the latest in a continued series of recent NLRB opinions encroaching upon nonunion employers' ability to manage their businesses. This client alert explains the importance of these developments and what employers should do now.

The first of these decisions was *Miller Plastic Products, Inc*., 372 NLRB No.134 (2023). That case arose in the early stages of the COVID-19 pandemic. The employee at issue complained to management at an all-employee meeting on March 16, 2020, stating that he thought the business should be shut down during the pandemic for safety reasons. He had further discussions with managers in which he expressed concerns about safety in the workplace. A few days after these conversations, the employee was seen in a work area texting on his phone and was terminated for "talking, poor attitude, and lack of profit."

The issue before the Board was whether the employee's conduct was "concerted." The Board found that it was concerted, but that is not the notable thing about this decision. The NLRB majority took this opportunity to overturn its 2019 decision in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), where the Board set forth factors that it would typically analyze in cases where it was unclear whether an employee was bringing a "truly group" complaint to management's attention. The factors were:

1. Whether statements are made in an employee meeting or similar setting where working conditions are being discussed;

2. The subject discussed/involved affects multiple employees, not just the lone employee;

3. The employee who speaks or acts is doing so in order to complain, criticize, or bring about change and isn't merely asking questions about how a policy is being implemented;

4. The speech or conduct concerns the workforce generally and not the speaker himself or herself; and

5. In cases involving statements made at a meeting, whether the meeting presented the earliest chance for the employee to address the issue, such that the employee was not able to discuss it with coworkers before the meeting.

The *Miller Plastic* Board opined that the multifactor test was too limiting and inconsistent with its earlier precedent. With regard to the *concerted* nature of the conduct before it, the Board majority pointed out that although there was no group action present or contemplated at the March 16 meeting, the employee later spoke with coworkers about safety issues relating to COVID-19. This was sufficient to render his statements during the March 16 meeting concerted, albeit on a retroactive basis. Importantly, the Board noted that *Alstate* had incorrectly reversed *WorldMark by Wyndham*, 356 NLRB 765 (2011), a case where an employee criticized the employer's new dress code policy to a manager, in the presence of two coworkers. During the course of this conversation, a second employee chimed in that he agreed with the criticism of the dress code. The Board in that case concluded that the limited "group" activity was enough for the NLRA to protect the employee. *Alstate* reversed course and held that an employee had to point to stronger evidence of a group action. The NLRB has now returned to the rule in *WorldMark by Wyndham*.

In the wake of *Miller Plastic*, employers should examine closely any discipline of an employee who has spoken up about working conditions, even if there is no evidence that the employee either has engaged in group action or is trying to induce group action. It may well be enough if there has been some limited group involvement or *could* be group action at a later time.

The second case is *American Federation for Children, Inc*. 372 NLRB No. 137 (2023). In that case, an employee was discharged after she advocated for the rehire of a former coworker. All of the members of the NLRB panel deciding the case agreed that the former coworker qualified as an "employee" within the meaning of the NLRA and that advocacy on behalf of the former coworker was covered by Section 7 of that law. However, the NLRB majority took the further step of reversing a 2019 decision, *Amnesty International of the USA, Inc*., 368 NLRB No. 112 (2019)

In *Amnesty International*, a group of unpaid interns decided to write a petition requesting that the employer start paying them for their work. The group of interns asked an employee of Amnesty International to help them with the petition. The employee agreed, and two Amnesty International employees encouraged other employees to sign the petition. The petition only mentioned pay for the nonemployee interns. It did not mention anything about the working conditions of employees, and there was no evidence on record in that case that the employees who signed the petition did so out of any motivation related to their own working conditions. It is now unclear whether and to what extent, employees advocating for interns, vendors, business partners, contractors, and other nonemployees will now be found to be cloaked in the NLRA's protection.

This pair of cases greatly expands the scope of the NLRA. Now, activity might be protected even though there was no group action in play (or even contemplated) at the time. An employer runs the risk of violating the NLRA if it disciplines an employee for raising what appears to be an individual gripe if there is a chance that the gripe could, in fact, later morph into a group concern. Likewise, an employer must pause and consider whether employees lobbying for people who don't work for the employer might be protected by the NLRA. What if employees bring a complaint to management in support of contractors at the employer's facility? Or temporary employees from an agency who do not work for the employer? Or unpaid interns?

These cases are the latest in the NLRB's recent aggressive expansion of the NLRA's coverage in nonunion workplaces. We will continue to monitor these developments, both as they pertain to the issues raised in these cases and in other areas in which the NLRB broadens the coverage of the NLRA.

If you have questions about these recent developments, contact any member of Baker Donelson's Labor & Employment Team.