More NLRB Rulings Illustrate Broad Scope Of "Concerted Activity" Protection

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In a recent alert, we reported on two recent cases before the National Labor Relations Board (NLRB) involving a provision of the National Labor Relations Act (the Act) that protects employees' rights to engage in "concerted activity." Under this provision of the Act, "concerted activity" includes, among other things, two or more employees discussing wages, hours, or working conditions. The Act prohibits employers from disciplining or discriminating against employees who engage in such discussions. This "concerted activity" protection extends to employees whether or not they are unionized.

In one of the cases discussed in our earlier alert, the employer allegedly fired an employee for her disparaging Facebook posts about a supervisor, to which several of her Facebook "friends" who were also co-workers added their comments. The employer fired the employee for violating a policy in its company handbook prohibiting employees from making disparaging or defamatory comments when discussing the company or their superiors. The NLRB filed a complaint against the employer asserting that its policies and disciplinary actions were an unlawful infringement on the Act's "concerted activity" protection because the Facebook communications between the fired employee

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and her co-workers were discussions about working conditions.

In the other case mentioned in our recent alert, the NLRB filed a charge against an employer for infringing on the Act's "concerted activity" protection because the employer was enforcing a policy in its company handbook that prohibited "the use of electronic communication and/or social media in a manner that may target, offend, disparage, or harm customers, passengers, or employees; or in a manner that violates any other company policy."

Now, two more NLRB rulings on the scope of the Act's "concerted activity" protection illustrate how broad this protection can be.

In *Wyndham Resort Development Corp.*, the NLRB ruled that an employer unlawfully disciplined an employee for engaging in protected "concerted activity." The case involved a new rule imposed by the employer requiring that shirts be tucked in. An employee complained to a manager about the new rule when coworkers were present. During this confrontation, one of the employee's coworkers also complained about the new rule by saying he "didn't sign up for this crap." The manager later issued a written warning to the first employee who complained for being argumentative and stated that he "incited" another employee to join in during the confrontation.

The NLRB in *Wyndham* held that the employer's written warning was an unlawful

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infringement on the Act's "concerted activity" protection because the employee "reasonably expected" that some of his coworkers who enjoyed wearing their shirts untucked would disagree with the rule and he made references to "we" and "us" when opposing the employer's new rule. The NLRB believed the fact that a coworker joined in also demonstrated "concerted activity" and noted that the employer referenced this in the written warning. The NLRB concluded that the employer disciplined the employee because he complained about the new rule in a group setting that was likely to induce "concerted" action.

In *Parexel International, LLC,* the NLRB ruled that the employer violated an employee's right to engage in protected "concerted activity" when it fired her because it did not want her to discuss her concerns about wages with coworkers. The NLRB found that the employer terminated the employee as a "pre-emptive strike" to prevent her from discussing her belief that the employer's setting of wages was discriminatory with other employees. The NLRB concluded that the employee's termination meant that she and her coworkers were denied the opportunity to compare their wages and other terms of employment and determine whether to take further "concerted" action in response to substandard wages or perceived wage discrimination.

In *Parexel*, the NLRB observed that under the Act's protection of "concerted activity" an employer may not interfere with, restrain or coerce employees in the exercise of their rights to discuss wages, hours, or working conditions, and decided that if an employer acts to prevent protected "concerted activity," that is, to "nip it in the bud" in the NLRB's words, such action interferes with and restrains the exercise of such rights and is unlawful. The NLRB ordered the employer to reinstate the employee.

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The lesson for employers from these most recent NLRB rulings is to be careful about disciplining or firing an employee who voices concerns or makes complaints to a manager or supervisor about working conditions or pay, especially in situations where other employees are present or where the employee may share his or her gripe with coworkers. These recent rulings also illustrate the importance of having effective procedures for responding to employee complaints.

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