

How to Spot “Protected Concerted Activity” in the Workplace

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Agenda

- **What is protected concerted activity (“PCA”)?**
- **Types of violations**
- **NLRB’s process**
- **Proactive steps for employers**



“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives or their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ...”

- Section 7 of NLRA, 29 U.S.C. § 157



“We think the right to engage in protected concerted activity is one of the best kept secrets of the NLRB.”

- Former NLRB Chairman Mark Gaston Pearce, 2012



“As the percentage of private sector employees represented by labor organizations has declined over recent decades, the fundamental Section 7 right to engage in protected-concerted activities may be more important than ever.”

-Introduction to current NLRB Training Module for Investigators on Protected Concerted Activity



Concerted

- Two or more employees planning and taking action together, or
- One employee, acting “on the authority of other employees,” for the benefit of multiple employees
- One employee seeking to initiate group action



Protected

- Involves a term or condition of employment
 - E.g. compensation, safety, hours, benefits, firing/layoffs, union activities
- Egregious misconduct may make activity lose protection



Unfair Labor Practices

Employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

-Section 8(a)(1) of NLRA, 29 U.S.C. § 158(a)(1)



Unfair Labor Practices

Violations relating to specific employees

- Employer knew or believed employee engaged in PCA
- Employer took discriminatory action because of PCA
 - E.g. discharge, discipline, demotion, failure to hire, or threatening to do any of these
- Defense: Employer would have taken same action in absence of PCA



Policy or Rule Violations

Can the policy or rule be reasonably expected to chill employees' exercise of PCA?

- Confidentiality
- Criticism of employer
- Compensation
- Social Media
- Company logos, copyrights, trademarks
- Bans on photography, videos, or cell phones



NLRB Process for Alleged Unfair Labor Practices

- Charge
- Investigation
 - Request for information, interviews, site visit
- If charge has no merit, employee may withdraw or NLRB dismisses
- If charge has merit, parties have approximately 30 days to settle or NLRB issues complaint
- Trial before administrative law judge
- Review by 3-member panel of board, then by courts



Penalties

- Reinstatement
- Backpay
- Notice posting
- NO, fines, punitive damages, or civil cause of action



Action Items

- Review handbooks, policies, and rules
- Review employment contracts
- Management training
- Act on “red flags” before PCA occurs

