



What Every Employment Lawyer Needs to Know About the National Labor Relations Act

A small group of support staff at a law firm—all nonunion, at-will employees—agree to wear orange shirts on Fridays to protest the firm’s recent decision to impose an across-the-board 10 percent wage cut. All employees involved in the “color-coordinated effort” are subsequently discharged. Given their at-will status, do these employees have any recourse against the firm?¹

A common misconception among the employment law bar is that the National Labor Relations Act confers rights only on unionized employees. While the act regulates the relationship between the employer and the union and between the union and its members, the most fundamental right protected under the act—an employee’s right to act in concert with others concerning the terms and conditions of employment—applies to a vast majority of private-sector employees regardless of their unionized status. Consequently, an at-will employee discharged for engaging in a concerted activity regarding the terms and conditions of employment—like the nonunion support staff described above—may have a claim against the employer under the act, notwithstanding his or her at-will status, which would otherwise allow for termination based on a good reason, bad reason, or no reason at all.

By John R. Runyan and Mami Kato

FAST FACTS

The fundamental protection of the National Labor Relations Act—employees’ right to band together in efforts to collectively improve their working conditions—applies to most private-sector employees, including at-will employees, without the benefit of union representation.

When an at-will employee is disciplined for engaging in collective action regarding the terms and conditions of his or her employment, the discipline becomes unlawful despite the employee’s at-will status.

“Employee” Under the National Labor Relations Act: Who is Protected?

The act defines an “employee” as “any employee” of an employer subject to the act—including former, present, and prospective employees, but excludes agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and employees covered under the Railway Labor Act (45 USC 151 *et seq.*).² The act applies to most employers in the *private* sector, including unions acting in their capacity as employers.³ The National Labor Relations Board has interpreted the term to mean “members of the working class generally,”⁴ and in *NLRB v Washington Aluminum Company*, the United States Supreme Court recognized the rights of unrepresented, “wholly unorganized” employees under the National Labor Relations Act.⁵ Accordingly, disciplinary action taken against an at-will employee may be unlawful if it violates the employee’s right under the act.⁶

Protected Concerted Activity: Section 7 Rights

Section 7 of the act provides employees with various rights, including the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection,”⁷ which serves the act’s purpose “to protect the right of workers to act together to better their working conditions.”⁸ “Mutual aid or protection” is broadly defined to include employees’ collective action in their efforts to improve the terms and conditions of their employment or otherwise improve their lot as employees.⁹ In *Washington Aluminum*, the Court held that seven unrepresented machinists who walked out of their jobs to protest bitterly cold working conditions were engaged in protected concerted activity and their retaliatory discharge was therefore unlawful under the act. Also protected by Section 7 are concerted activities relating to the terms and conditions of employment outside the immediate employee-employer relationship including resort to legislative, administrative, and judicial fora¹⁰ and communications to the public—including media—concerning an ongoing labor dispute.¹¹ The act defines “labor dispute” broadly to include “any controversy concerning terms, tenure or conditions of employment . . .”¹²

The Board has emphasized that Section 7 protects “the right to act together to try to improve [employees’] pay and working conditions or fix job-related problems, even if [the employees] aren’t in a union.”¹³ It has also made clear that employees not represented by a union have the right to engage in concerted activity “for their mutual aid or protection regarding terms and conditions of employment”—such as addressing the employer about increasing their pay and discussing work-related issues beyond wages, including safety concerns and improving workplace conditions.¹⁴ Rights under Section 7 are broad enough to protect a range of concerted activities concerning the terms and conditions of employment—without regard to the affected employees’ affiliation with a union and regardless of whether the concerted activity was undertaken in connection with a union organizing drive;

employers may not retaliate against at-will employees for exercising such rights.¹⁵

The purpose of the act is to promote the free flow of commerce through collective bargaining; the reach of Section 7 rights, therefore, is confined to promoting industrial peace and stability. The act does not protect actions that are unlawful, violent, or in breach of contract—regardless of the subject matter involved.¹⁶ Insubordination, disobedience, or disloyalty committed for the purpose of mutual aid or protection is unprotected if unrelated to a labor dispute.¹⁷ Because emotions may run high during a labor dispute, rude and emotional outbursts made in the context of mutual aid or protection during such a dispute are granted wider latitude, and such conduct loses the act’s protection only if it is flagrant or egregious. In deciding whether the action was sufficiently egregious to be removed from the act’s protection, the Board looks to (1) the incident’s location, (2) subject matter, (3) nature of the outburst, and (4) whether the outburst was in any way provoked by an employer’s unfair labor practice(s).¹⁸ Ultimately, the question turns on a fact-specific inquiry.

Can a Single Employee Engage in Protected Concerted Activity?

Concerted activity generally requires two or more employees acting in concert, but under certain circumstances even a single employee may engage in protected concerted activity. An employee’s activity is concerted if engaged in with, or on the authority of, other employees and not solely by and on behalf of the employee.¹⁹ Additionally, an individual who seeks to initiate, induce, or prepare for group action or brings truly group complaints to the employer’s attention is deemed to have engaged in protected concerted activity.²⁰

An individual complaint on matters of common concern to all employees is not per se concerted activity; unless an employee is representing the views of other employees, an individual complaint expressed in private is unprotected griping.²¹ An individual need not be formally designated by other employees as their spokesperson; rather, an action is concerted activity so long as



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the employee is at least impliedly representing the views of other employees.²² The Board and the courts have held that a single employee who speaks up during a meeting on matters of common concern (e.g., safety protocols, break policy) engages in protected concerted activity because, in such circumstances, it can be inferred that the employee is acting with the purpose of furthering group goals by inducing or preparing for group action.²³ Publicly expressed objection on matters of common concern is more likely to be concerted activity because of its inherent potential for instigating group action.

Mandatory Confidentiality in Disciplinary Investigations

In investigating workplace complaints, an employer may prefer that the employees involved remain quiet for a variety of reasons. Mandatory confidentiality in disciplinary investigations, however, has been found to violate employees' Section 7 right to discuss matters concerning the terms and conditions of employment, including matters that may be the subject of ongoing investigation such as sexual harassment or an alleged safety violation. A policy directing complaining employees not to discuss the matter with their coworkers is unlawful because it coerces the complaining employee(s) into silence, resulting in unlawful restraint of Section 7 rights,²⁴ with or without a threat of discipline accompanying the confidentiality mandate.²⁵

Nevertheless, an employer may lawfully impose confidentiality during a disciplinary investigation if legitimate and substantial business justifications outweigh the employees' Section 7 rights. A lawful demand for confidentiality requires specific evidence that confidentiality was necessary to ensure witnesses' safety, preserve evidence, prevent falsified testimony, or prevent a cover-up.²⁶ It is a fact-specific inquiry on a case-by-case basis; general concern for the integrity of the investigation will not permit mandated confidentiality in violation of employees' Section 7 rights.²⁷

Employer Policies That Infringe on Employees' Section 7 Rights

Various employer policies invite National Labor Relations Act scrutiny when they are broad enough to restrict the employees' right to engage in collective action.²⁸ The National Labor Relations Board has consistently held that a work rule or policy that reasonably tends to chill employees' exercise of their Section 7 rights is unlawful.²⁹ A rule explicitly restricting employees' concerted activity is per se unlawful; any rule containing language

that (1) employees would reasonably construe as prohibiting their Section 7 activity, (2) was promulgated in response to union activity, or (3) has been applied to restrict concerted activity in the past is likewise unlawful.³⁰

Workplace rules that are ambiguous in their application to concerted activities and fail to provide limitations from which employees could clearly understand that the rules do not apply to their Section 7 rights have also been found unlawful. The Board has held that a rule strictly prohibiting any disclosure of personnel information was unlawful because the rule was overbroad and suggested to employees that engaging in certain Section 7 activities—e.g., discussing wages, benefits, and working conditions with each other—would not be tolerated.³¹ An anti-negativity rule proscribing any negative conversation, including conversations about working conditions, was also found unlawful because it had the potential to chill the exercise of protected concerted activity.³² On the other hand, rules providing appropriate context are lawful. A rule prohibiting “disloyal, disruptive, competitive or damaging conduct”—unprotected conduct—has been upheld because it did not cause employees to interpret the rule as restricting their Section 7 rights.³³ A rule prohibiting employees from walking off the shift without permission—a Section 7 right recognized in *Washington Aluminum*—was lawful when placed in the proper context of the patient care and safety provisions of the employee handbook.³⁴

A general disclaimer of at-will status may be unlawful if it is sufficiently overbroad to eliminate employees' Section 7 right to organize, although the law in this area is still unsettled. In advice memoranda, the Board's general counsel has indicated that a blanket waiver of at-will employees' Section 7 right to form, join, or assist a union in efforts to change their at-will status—such as a statement reading, “I agree that the at-will employment relationship cannot be amended, modified, or altered in any way”—would be unlawful.³⁵ On the other hand, at-will disclaimers that leave some possibility of altering the at-will status are likely to be upheld. In examining these provisions, the Board's general counsel has approved a provision that “no representative of the Company has authority to enter into any agreement contrary to the foregoing ‘employment at will’ relations.” Such language would be lawful because it does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way.³⁶

A recent decision involving an employer's proscription against class arbitration claims also implicated the Section 7 rights of non-union employees. In *DR Horton*, the Board held that an employer violated the act by implementing a workplace policy prohibiting

employees from exercising their Section 7 rights to initiate or participate in class, collective, or other representative legal actions.³⁷ As a condition of employment, D.R. Horton's employees were required to execute an agreement prohibiting class or collective actions, waiving employment-related lawsuits, and limiting dispute resolution to final and binding arbitration. The Board recognized that the "right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest"³⁸ and concluded "employees who join together to bring employment-related claims on a class wide or collective basis in court or before an arbitrator are exercising rights protected by section 7 of the NLRA."³⁹ The *DR Horton* decision is awaiting review in the Fifth Circuit Court of Appeals.

Conclusion

What employee representatives should take away from this article is the realization that even nonunion employees enjoy rights under the National Labor Relations Act. When evaluating the potential claims of an employee who has been discharged or disciplined, employee representatives need to keep the act in mind as well as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and comparable state legislation.

Employer representatives must also be mindful that nonunion, even at-will, employees enjoy rights under the act. When drafting at-will disclaimers and reviewing various employer policies and workplace rules, including social media policies, employer representatives need to be mindful of overbroad provisions that unreasonably restrain employees' right to engage in concerted activity. The same care needs to be taken when drafting or reviewing employers' confidentiality policies, including the procedures for disciplinary investigations. ■



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ENDNOTES

1. A similar incident actually occurred in March 2012 when a law firm in Florida terminated employees for wearing orange shirts supposedly to protest the firm's new work rules.
2. 29 USC 152(3).
3. 29 USC 152(2). The National Labor Relations Act's definition of "employer" excludes the United States, any wholly owned government corporation, Federal Reserve Bank, state and local governments, and employers subject to the Railway Labor Act.
4. *Giant Food Markets, Inc.*, 241 NLRB 727, 728 n 5 (1979).
5. *NLRB v Washington Aluminum Co.*, 370 US 9, 14; 82 S Ct 1066; 8 L Ed 2d 298 (1962).
6. 29 USC 158(a)(1) makes it unlawful for any employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. A Section 8(a)(1) violation is a ground for unfair labor practice charge filed with the National Labor Relations Board.
7. 29 USC 157. This is in addition to employees' right to self-organize; form, join, or assist unions and engage in collective bargaining; or refrain from these activities.
8. *Washington Aluminum*, 370 US at 14.
9. *Eastex, Inc v NLRB*, 437 US 556, 565; 98 S Ct 2505; 57 L Ed 2d 428 (1978).
10. *Id.* (internal citations omitted).
11. *Hacienda de Salud-Española*, 317 NLRB 962, 966 (1995).
12. 29 USC 152(9).
13. NLRB, *Protected Concerted Activity* <<http://www.nlr.gov/concerted-activity>>. All websites cited in this article were accessed August 4, 2013.
14. NLRB, *Employee Rights* <<http://www.nlr.gov/rights-we-protect/employee-rights>>.
15. The National Labor Relations Board has exclusive jurisdiction for addressing Section 8(a)(1) violations concerning an employer's unlawful restraint on employees' Section 7 rights. A suspected violation is addressed by filing an unfair labor practice charge with the Board, not by beginning a lawsuit in state or federal courts.
16. See *Washington Aluminum*, 370 US at 17 (internal citations omitted).
17. *NLRB v IBEW Local 1229*, 346 US 464, 475; 74 S Ct 172; 98 L Ed 195 (1953).
18. See *Atlantic Steel Co.*, 245 NLRB 814 (1979).
19. *Meyers Industries (I)*, 268 NLRB 493, 497 (1984).
20. *Meyers Industries (II)*, 281 NLRB 882, 887 (1986).
21. See *Manimark Corp v NLRB*, 7 F3d 547 (CA 6, 1993).
22. *NLRB v Talsol Corp.*, 155 F3d 785, 796 (CA 6, 1998).
23. *Id.* (safety concerns raised by an employee during a meeting); see also *NLRB v Caval Tool Division*, 262 F3d 184 (CA 2, 2001) (a single employee objecting to a new break policy during a meeting).
24. *Banner Health System*, 358 NLRB No 93, slip op at 2 (July 30, 2012).
25. *Id.*
26. *Hyundai America Shipping Agency, Inc.*, 357 NLRB No 80, slip op 15 (August 26, 2011); see also *Caesar's Palace*, 336 NLRB 271, 272 (2001).
27. *Banner Health System*, n 24 *supra* at 2.
28. For discussion on emerging social media policies, see *National Labor Relations Board Guidelines for Social Media* by Terry Morgan, NLRB regional director for Region 7 in Detroit, elsewhere in this issue.
29. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).
30. *Lutheran Heritage Village—Livonia*, 343 NLRB 646, 647 (2004).
31. *IRIS USA, Inc.*, 336 NLRB 1013 (2001); *Flex Frac Logistics, LLC*, 358 NLRB No 127 (September 11, 2012).
32. *Claremont Resort and Spa*, 344 NLRB 832 (2005).
33. *Tradesmen International*, 338 NLRB 460 (2002).
34. *Wilshire at Lakewood*, 343 NLRB 141 (2004).
35. *American Red Cross Arizona Blood Services Region*, 28-CA-23443 (February 1, 2012).
36. *Mimi's Café*, Advice Memo 28-CA-084365 (October 31, 2012); *Fresh & Easy Neighborhood Market*, Advice Memo 21-CA-085615 (February 4, 2013).
37. *DR Horton, Inc.*, 357 NLRB No 184 (January 3, 2012), *pet for review pending*.
38. *Id.* slip op at 12.
39. *Id.* at 3.