

NLRB Expands Scope of What Is Considered Protected Concerted Activity in Workplaces

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On August 31, 2023, the National Labor Relations Board (“NLRB” or “Board”) adopted a broader test for what is considered “protected concerted activity” under the National Labor Relations Act (“NLRA” or the “Act”). Section 7 of the NLRA protects employees’ right to engage in concerted activities for the purpose of mutual aid or protection, otherwise known as “protected concerted activity” or “PCA.” Whether an employee’s conduct qualifies as “concerted” depends on whether their activity is linked to those of other employees. On the other hand, whether the employee’s activity is for “mutual aid or protection” focuses on whether the employee(s) involved are seeking to improve their conditions of employment. This standard applies to union and union-free settings.

The Democratic-majority Board panel recently ruled in [Miller Plastic Products, Inc.](#) that in future cases, it would look to the “totality of the circumstances” on a case-by-case basis to determine whether an employee engaged in protected concerted activity, qualifying for protection under the NLRA. The Board found an employee’s comments about keeping a plant open during the COVID-19 pandemic were protected concerted activity, applying the broader “totality of circumstances” test. In so doing, the Board overruled its prior Trump-era ruling in *Alstate Maintenance* (see our prior blog post [here](#)). The Republican-majority Board in *Alstate Maintenance* held that employees must demonstrate prior “concerted” activity in order to prove their conduct was protected, and raising concerns in a group was not necessarily protected. In *Miller Plastic Products*, the NLRB overturned *Alstate Maintenance* and claimed to reinstate its prior 1986 standard that “the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.”

NLRB Precedent on “Concerted Activity”

The basic framework for determining whether certain employee conduct is concerted under the NLRA was set out in two decisions commonly referred to as *Meyers I* and *Meyers II*. In *Meyers I*, the Board

held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers II*, the Board clarified that concerted activity "encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In those cases, the Board cautioned that the announced guidelines were not exhaustive and that any question of whether an employee engaged in concerted activity is a factual one based on the totality of the record evidence.

The Board provided further context to the "concerted activity" analysis in *WorldMark by Wyndham*, 356 NLRB 765 (2011), which held that a single employee who gripes in a group setting is engaged in protected activities under the NLRA without regard to whether the employee is raising a group complaint or seeking to initiate, induce, or prepare for group action.

Without overturning either *Meyers* decision, the Board, in the 2019 *Alstate Maintenance* case, addressed more specifically the kinds of actions that constitute protected concerted activity when they take place in front of other employees. In *Alstate Maintenance*, the Board's majority held that the individual employee's complaint to his manager about the possibility of not getting a tip was not concerted activity under the NLRA even though the complaint was made in front of other employees. Rather, the individual complaint was a "mere gripe," not a "concerted" complaint made on behalf of, or to induce action by, his co-workers. The Board's majority in *Alstate Maintenance* rejected a *per se* rule that complaints in group settings are concerted activity, reasoning that it "conflate[s] the concepts of group setting and group complaints." The Board reiterated that simply making a complaint in the presence of others does not, standing alone, define the character of the activity, and that determining whether an employee has engaged in concerted activity requires consideration of all of the surrounding facts. The Board identified the following factors that should be considered to determine whether an employee's complaint is intended to induce group action and therefore considered "concerted", including (1) the statement is made in an employee meeting called by the employer to announce a decision affecting a term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement does so to protest or complain about the decision, not merely to ask questions about how the decision has been or will be implemented; (4) the speaker protests or complains about the decision's effect on the work force generally or some portion of the work force, not solely him or herself; and (5) the meeting was the first opportunity to address the decision (i.e., there was no opportunity to discuss with co-workers beforehand). The Board's majority explained that not all of these factors are required to support an inference that an employee is seeking to initiate or induce group action.

Returning to Totality of Record Evidence Approach

In *Miller Plastic Products*, the NLRB overturned *Alstate Maintenance* and claimed to reinstate its prior standard from 1986 that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence," including all facts and circumstances. According to the Board, the prior *Alstate Maintenance* decision was unfairly rigid and restricted workers' rights because it ignored spontaneous concerted activity, instead of activity at formal meetings or complaints raised. Instead, the Board found that the "totality of the circumstances" test was more in line with the NLRA. Based on these interpretations, the Board ultimately affirmed the ALJ's decision in finding that the employee's conduct was concerted under the totality of the circumstances test.

The sole Republican member of the Board, Member Kaplan, concurred in the decision, but stated

that the *Alstate Maintenance* standard remained appropriate. Member Kaplan challenged the majority's decision to overturn *Alstate Maintenance* as unnecessary as all four members of the Board agreed that, even applying *Alstate Maintenance*, the conduct at issue would still be found to be concerted and protected. Member Kaplan defended the holding in *Alstate Maintenance* as in line with the *Meyers* decisions, that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural."

Takeaways

This ruling is yet another employee-friendly decision expanding employee rights under the NLRA and scrutinizing employer actions, making it easier for employees to challenge workplace policies and practices. Overruling the clear factors set forth in *Alstate Maintenance* means that it will be more difficult for employers to evaluate whether particular actions are or are not protected by the NLRA. Thus, it will be challenging for employers to assess with any degree of certainty whether individual conduct or complaints are ultimately deemed "concerted" by the Board and thus protected by the NLRA.

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