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Labor Board Expands Protections Under the NLRA to Individual Complaints and Conduct

Article By:

Aaron Vance

As part of its apparent “12 Days of Labor” in the lead-up to the Labor Day holiday involving a flurry of decisions, the National Labor Relations Board issued its decision in *Miller Plastic Products Inc.*, dramatically expanding the definition of protected concerted activity – a decision that could be interpreted to capture nearly all individual complaints concerning an employee’s terms and conditions of employment.

Historically, under the National Labor Relations Act (NLRA), an employee’s individualized complaints, even when about the terms and conditions of their employment (i.e. wages, benefits, etc.), have not been viewed as protected concerted activity absent clear proof that the complaints are related to broader group complaints. The board’s decision in *Miller Plastic Products* significantly loosens this second requirement. In doing so, the board ditched its 2019 decision in *Alstate Maintenance LLC* to instead reinstate an earlier standard from the *Meyers Industries* cases from the late 1980s concerning whether an individual’s conduct rises to the level of being protected concerted activity.

Meyers Industries I and *II* set forth a holistic fact-intensive inquiry that examined the totality of the circumstances to determine whether there is a connection between individual activity and current or potential group activity. This is compared to the more limited test from *Alstate Maintenance*, which required actual evidence of some prior or contemporaneous discussion on the same issue and further setting forth a five-part test to determine whether a statement at a meeting in front of other employees qualified as protected activity.

Most concerning for employers under this revived standard is the notion that under the circumstances, it may be determined that an employee’s individual action may have been the product of the group’s tacit authority, and that actions in a group context provide strong support for such authority. Even more concerning for employers, the board stated any “activity that at inception involves only a speaker and a listener can be concerted, ‘for such activity is an indispensable preliminary step to employee self-organization.’”

While the employee’s intent still must be confirmed under the totality of the circumstances, it’s hard to see how, with such an expansive test under a sympathetic board, that such activity ultimately won’t be found to qualify as protected concerted activity. As such, employers must now be mindful

that nearly any statement by an individual concerning the terms and conditions of their employment might now qualify as protected concerted activity. And, if such conduct or complaints are disruptive or even profane, employers need be especially mindful of their response to avoid any perception of retaliation and facing the possibility of an unfair labor practice charge.

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