EMPLOYER'S WARNING TO "TUCK IN YOUR SHIRT" LEADS TO LIABILITY

It seems that these days almost any type of complaint made by a single employee in front of others will now be protected by the federal National Labor Relations Act. The latest development involves a time share company in Las Vegas that announced a new policy requiring sales representatives to tuck in their shirts. The NLRB found the company's warning given to the employee who questioned the new policy in front of others to be unlawful. Reference: Worldmark by Wyndham, 356 NLRB No. 104 (March 2, 2011).

An employee questions the new "Tuck in Your Shirt" policy in front of others and is warned by the boss.

This non-union company had a "resort casual" dress code, and many sales reps wore their "Tommy Bahama" style shirts un-tucked. One day, before a regular sales meeting, the boss told one of the sales reps that there was a new shirt-tuck policy. The sales rep, who was standing with two others, then asked if the policy was company-wide or "just us" and why the new policy had not been issued in writing. One of the other reps joined in, saying that the policy is "pretty restrictive," that he "didn't sign up for this crap" and that he "didn't need the money." During this exchange, several other sales reps gathered, and the boss then told the two who had voiced their opinions to go home for the day. But then he thought better of that and asked them both to join him in his office for a "chat." There, he talked about how his daughter didn't follow their family rules and how that affected his family. Both reps apologized and were allowed to return to work. A few days later, the first rep, who had been given a previous warning for questioning the company's commission payments during a sales meeting, was given a written warning for "continuing to argue on the sales floor in front of the team" and for "inciting another rep to join in."

The NLRB finds the employee's complaint to be "concerted" and legally protected.

A charge was then filed with the NLRB that has the power to enforce the National Labor Relations Act in private, non-governmental settings - even if a union is not involved. The NLRB ultimately held (in a 2 to 1 decision) that the warning given in this case was unlawful and violated the rights of the sales reps to engage in concerted activity for their mutual aid and protection. The issue in this and other cases centers on two questions: Is the activity for "mutual aid and protection" and, if so, is it concerted? The first question is usually easily answered because any activity or expression by an employee of concern about wages, hours or working conditions would meet that test. The legal protection of the activity arises only if the activity is concerted. Since the 1980s, the NLRB has held that for an activity to be "concerted" it must be shown that the activity was "with or on the authority of other employees and not solely by and on behalf of the employee himself." Thus, group gripes were protected but individual gripes were not. Now, with the recent appointments to the NLRB by the current administration, what may seem to be an individual gripe may now be seen as concerted - and therefore legally protected. Any discipline, discharge or other adverse action taken against an employee for concerted activity as it is now broadly defined would have to be rescinded and if a discharge was involved - reinstatement and back pay.

Individual gripes that may now be seen as legally protected concerted activity.

Looking at this case and other recent cases that have considered the scope of protected concerted activity, the following practical points can be made:

Preparing for group action is protected.
An individual bringing truly group gripes to management's attention is protected.
A single employee's protest of changes in working conditions common to all employees is protected.
Even cussing out the boss when complaining about wages, hours or working conditions can be protected if the employee is provoked by the boss.
The use of "us" or "we" when voicing complaints even when others had not been asked to join can be protected.
Simultaneous individual complaints about the same issue can be protected.
There need not be an advance agreement or discussion among employees to raise a complaint.
The refusal to work by employees even when no prior discussion, when it was the "logical outgrowth" of earlier concerted activity, is protected.
Facebook postings critical of management may be protected.

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It is not necessary for the employees to be motivated by the same reasons or complaints to be protected.
Even if the activity was not actually concerted, the NLRB would still find that the adverse employment action was unlawful if it was based on the employer's perception that the conduct of the single employee was to incite other employees into action.
It is unlawful to discharge or discipline an employee to prevent the possibility that the employee might engage in future protected concerted activity.
What to do? Educate management about the broad scope of protected employee rights - even where no union is involved.

Given the direction of these recent NLRB decisions, it is important for all private employers - whether or not a union is involved - to make sure that all levels of management understand the broad scope of the protected rights of their employees. While it may be natural to call a halt to an argumentative employee in front of others, it will be risky. As news of these decisions of the NLRB becomes more well known (and news coverage is increasing), employers may expect that their responses to individual and group gripes will be challenged and tested.

Should you have questions, please contact your regular Hall Render attorney or a member of our Employment and Labor Section.

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