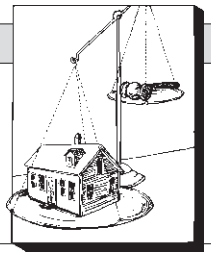
"Concerted Activity" and the Open Shop



by Duncan MacKay

You own a small contracting business, and the closest your employees have ever come to a union is wearing clothes with a union label. So you don't have to worry about disciplining or firing employees who complain about working conditions, salary, or vacations—right?

Wrong. Nonunion employees may be protected by the National Labor Relations Act (NLRA), which provides all employees certain rights and protections. Under the NLRA, employees not only have the right to form and join labor organizations, but they also have the right to join together informally to engage in "concerted activities."

Concerted activity is basically a more informal type of collective bargaining than the kind pursued by unions for their members. Essentially, it is any action taken by a group of employees (or one employee representing a group of employees) that concerns terms and conditions of employment. Such concerted activity is given a protection similar to that afforded actions by unionized employees.

The term "concerted activity" encompasses a wide range of both individual and group actions that further legitimate employee interests. The NLRA protects an employee's right to engage in such activities as long as the purpose is collective bargaining or "other mutual aid or protection." The most obvious form of concerted conduct is the use of a strike or picketing by employees. Nonunion employees have a right to strike similar to that of unionized employees.

The definition of concerted activity isn't limited to strikes or work stoppages. Some courts have found employees' actions to be protected where they do not assist collective bargaining; do not take place during working hours; and even when they do not take place at the business—such as when an employee testifies on an employment-related matter in a court of law. In general, the NLRA also makes it unlawful for an employer "to interfere with, restrain, or coerce" employees in the exercise of these rights.

The "reasonableness" of the employees' motives for engaging in concerted activity is not relevant to whether the activity is protected. In one case, an employee and his coworkers demanded a wage increase shortly after they were hired. The court held that while their request may have been unreasonable, the action could still be a protected concerted activity.

In addition, individual employee activity may also be protected under the NLRA. As one court stated, "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activities' as is ordinary group activity." Indeed, one seldom has one without the other.

The NLRA often protects employee actions that:

- are related to the terms or conditions of employment
- further mutual aid and protection
- require specific remedy or result
- are not unlawful or otherwise impermissible.

Relation to Terms and Conditions of Employment

The NLRA only protects concerted activities that reasonably affect the terms or conditions of employment. Courts, however, have taken a liberal view of the scope of those activities. Employees' conduct has been ruled protected in a variety of cases, such as where:

- one employee helped to organize another employer's workers
- employee representatives supported changes to a state workers compensation statute
- employees testified at an unemployment compensation hearing on behalf of a discharged fellow employee
- employee representatives lobbied legislators to oppose proposed revisions to the national immigration policy.

In addition, to be protected, an activity need not require any action by the employer or concern a matter over which the employer has direct control. It can even be outside the strict confines of the employment relationship. In fact, as long as the activity has some relationship to the terms or conditions of employment, such as job security, and is taken for "mutual aid or protection," it may be protected.

Courts will most likely see concerted activities as related to employment terms and conditions if they relate to wages, overtime, holiday pay, profit sharing, work hours, layoffs, firings, transfers, or working conditions. For instance, a walkout over inadequate heating was ruled related to terms or conditions of employment and, therefore, to be protected.

Mutual Aid or Protection

Individual employees' activities may be protected under the NLRA, but they must be done to further the mutual aid or protection of a group of employees, and not solely for the benefit of the individual complaining employee. This means that an individual employee's attempts to obtain better terms or conditions for him or herself is not protected. There must be some group involvement.

For instance, the filing of complaints with federal, state, or local agencies, such as insurance commissions, unemployment commissions, or occupational health and safety commissions, are protected concerted activities only when the action is with, or for, other employees. And the complaining employee must inform the employer that he or she represents other workers. When an employee acts individually, the employer must have actual knowledge of the concerted or group nature of the activity before any liability will follow.

For instance, in one court case, an employee discussed a safety situation with several other employees and their supervisor. That employee's subsequent refusal to perform his job was found to be protected because it was based upon a group complaint that had been communicated to a company supervisor.

Specific Remedy or Result

Generally, an employee activity must be directed towards achieving some specific remedy or result. At a minimum, it should initiate some group activity. However, nonunionized employees, who have no bargaining representatives and no established procedure for negotiating, do not have to specifically articulate their grievances. As long as an employer is reasonably aware of the target of their complaint, employee actions will be considered protected activity.

Unlawful Conduct

Courts will generally tolerate a certain amount of profanity or defiance in the course of an ongoing labor dispute. However, if an employees' conduct becomes so flagrant that it threatens the employer's ability to "maintain order and respect" in the conduct of business, it will not be protected. To determine whether an employee who is engaged in concerted activity loses the Act's protection, employers should consider the content and subject matter of the conversation; the nature of the outburst; and whether the outburst was in any way provoked by unfair labor practices. Consequently, employees' otherwise protected activities that rise to the level of either insubordination or disloyalty will not be protected.

The term "concerted activity" encompasses a wide range of both individual and group actions that further legitimate employee interests

Before employers take any action to discipline or terminate an employee for walking off the job, complaining about working conditions, or filing complaints with government agencies, they should check with qualified labor counsel to ensure that an employees' protected rights to engage in concerted activities are not impinged. ■

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