NLRB's General Counsel Provides Guidance on Balancing NLRA and Equal Employment Laws

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All employees have a right to engage in concerted activity under the National Labor Relations Act (NLRA)—often called "protected concerted activity (PCA)"—meaning that *even in a non-union environment,* an employer cannot retaliate when two or more employees are discussing the terms and conditions of their employment. While employees have PCA, the protection may be lost if the employee engages in "egregious behavior." The term "egregious" is very vague, and National Labor Relations Board (NLRB) decisions have not been particularly helpful. In fact, the Board has found in many cases that employees' conduct fell short of egregious behavior even when the behavior could be classified as discriminatory.

Take the case of Erik Williamson, who was a striker. During the strike, Williamson made an obscene gesture towards a female non-striker by grabbing his crotch in her direction. You know that this conduct violates your zero-tolerance harassment policy. Shouldn't you have the right to terminate an employee for violating company policy—particularly when the policy is there to comply with the Equal Employment Opportunity Commission's (EEOC) regulations on sexual harassment?

The employer in this case was probably shocked when the NLRB decided that Williamson's behavior—while inappropriate—was not egregious enough for Williamson to lose his PCA status. As such, the employer violated the NLRA when it terminated Williamson's employment and ordered that Williamson be reinstated with full back pay.

This case was not the first time the Board held that discriminatory and highly offensive behavior fell short of egregious behavior. The Board often bases these decisions on the premise that tensions run high in the exercise of PCA, and outbursts can be a normal outgrowth of these emotions and should be expected to some degree. But does "some degree" mean that an employee does not lose PCA protection by using the n-word to address a Black co-worker? What about calling a female non-striker a "whore" and a "prostitute"? Or exposing genitals to female non-strikers? The Board has held that in these situations, the employee's behavior was not egregious enough for the employee to lose protected concerted activity.

NLRB's General Counsel Issues Guidance on Employer Compliance

What's an employer going to do? It has to comply with anti-discrimination laws while also complying with the NLRA. Employers have rightfully been confused about how the Board's decisions can be reconciled with their

obligations under anti-discrimination laws. In an effort to address this confusion, on January 16, 2025, the NLRB's General Counsel (GC) published a memorandum explaining her opinion as to how employers can reconcile these two important statutes.

The GC's memo discusses enforcing the employer's "civility rule." Most of these policies seek to prohibit language and conduct covered by the employer's workplace harassment policy. The NLRB might say (and has on many occasions) that a threat of termination—or termination itself—violates the NLRA because this type of discipline may chill employees from engaging in protected concerted activity.

The memo suggests that employers "can avoid implicating potential EEO and NLRA concerns by maintaining and consistently enforcing an EEO anti-discrimination policy or rule that specifically prohibits discrimination based on EEO-protected characteristics." In a nutshell, employers can enforce workplace civility rules and policies that focus on unlawful harassment and discrimination without running afoul of the NLRA, as long as the employer is enforcing rules and policies consistently.

Confidentiality Rules in Workplace Investigations

The memo also addresses employer confidentiality policies. In an effort to have a full and complete investigation based on what witnesses actually know, employers have often asked witnesses not to discuss what was said during the interview. In several Board decisions, employers' confidentiality policies have been held to violate the NLRA if "rules that preclude *any* communication about the allegations, investigation or that are applicable to *any* employee–victim, witness, or third party–could be problematic for a number of reasons." (emphasis in original).

The GC opines that employers can design investigations so as not to run afoul of the NLRA and EEO laws without "imposing broad-based confidentiality rules on employees" by "maintaining strong anti-retaliation policies and ensuring that employees are aware of them." If confidentiality is truly needed, employers should "identify the scope of the confidentiality requirement to interviewees, including the information and matters it covers and how long it lasts, so that employees do not misunderstand the breadth of information covered and the applicable length of time."

What's Next? The Impact of a New NLRB

This memo was published just a few days before President Trump's inauguration. The Board is highly political, as the sitting president has the right to appoint three of the five members, while the opposing party selects two. It is unknown how the new Board will rule in situations where the NLRA may conflict with anti-discrimination laws. Stay tuned!

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