

ARE YOUR WORKPLACE POLICIES COMPLIANT WITH THE NLRA?

NLRB ISSUES MEMORANDUM GC 21-03 SIGNALING AGGRESSIVE AND EXPANDED ENFORCEMENT OF SECTION 7 RIGHTS

Date: 8 April 2021

U.S. Labor, Employment, and Workplace Safety Alert

By: Rosemary Alito, Rio J. Gonzalez

On 31 March 2021, Peter Sung Ohr, Acting General Counsel of the National Labor Relations Board (NLRB), issued [Memorandum GC 21-03](#) (GC 21-03) to the regional field offices signaling significant changes to enforcement priorities under Section 7 of the National Labor Relations Act (NLRA). In part, GC 21-03 indicates that the NLRB will be “robustly enforcing the Act’s provisions that protect employees’ Section 7 rights” and that “cases involving the retaliation against concerted employee conduct will be vigorously pursued.” GC 21-03 cites to increased workplace health and safety issues resulting from the COVID-19 pandemic as well as employees’ political and social justice advocacy concerns as factors necessitating increased enforcement of the NLRA.

NLRA PROTECTIONS

The [NLRA](#) is a federal law that grants employees the right to form or join unions; engage in protected, concerted activities; address or improve working conditions; or refrain from engaging in such activities. The NLRA applies to almost all private employers but does not apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act. Some employers are surprised to find that the NLRA protects nearly all employees in the private sector, not only union employees or employees seeking to form or join a union. In fact, concerted activities protected under the NLRA often occur outside of the context of union activity. The NLRA does not cover, however, government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).

It is not uncommon for the NLRB and its general counsel to modify or reverse their interpretations of the NLRA with changes in the composition of the Board. The political party of the presidency enjoys majority representation on the NLRB. Consequently, changes in the presidential administration often lead to significant changes for employers. GC 21-03 is emblematic of that trend. It states that “recent decisions issued by the current Board have restricted [Section 7 rights] for employees.” Specifically, GC 21-03 criticizes recent NLRB decisions, including *Alstate Maintenance*,¹ for applying “mutual aid and protection” narrowly. The enforcement priorities highlighted in GC 21-03 are in stark contrast to enforcement priorities under the previous administration and a clear indication that employers should expect increased NLRB oversight for the foreseeable future.

BROADENED CONCERTED ACTIVITIES FOR MUTUAL AID AND PROTECTION

Section 7 of the NLRA grants all covered employees the right to engage in “concerted” activities for the purpose of “mutual aid or protection.” The phrase “mutual aid or protection” focuses on “whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.”² GC 21-03 indicates that such a link will be broadly construed, and it outlines an expansive characterization of what constitutes protected, concerted activity. As noted in GC 21-03, employee advocacy can have the goal of “mutual aid or protection” even when the employees have not explicitly connected their activity to workplace concerns. As examples, GC 21-03 cites to a solo strike by a pizza shop employee to attend a convention; protests in response to a sudden crackdown on undocumented immigrants or social justice concerns; and a hotel interview with a journalist concerning minimum wage issues. In addition, GC 21-03 highlights how concerted activity can occur outside of the context of union activity—such as when employees raise health and safety issues resulting from the COVID-19 pandemic or seek protections from government agencies.

RENEWED APPLICATION OF INHERENTLY CONCERTED CONDUCT

In addition to a clear directive to interpret concerted and protected activity more broadly under the NLRA, GC 21-03 also signals a renewed enforcement of conduct that is deemed “inherently concerted.” As noted in GC 21-03, employee conduct generally becomes concerted when it is “engaged in with or on the authority of other employees”³ or when an employee seeks either “to initiate or to induce or to prepare for group action.”⁴ In other words, concerted conduct revolves around employees’ intention to band together to improve their wages or working conditions. However, contemplation of group action is not required and employee discussions surrounding certain employment policies may be sufficient to constitute inherently concerted activity—even if group action has not yet been contemplated or is in its early stages. Indeed, as noted in GC 21-03, inherently concerted conduct need only involve a “speaker and a listener.” Further, GC 21-03 emphasizes that there are no “magic works” required for concert to attach. However, the NLRB has previously found that certain categories of workplace life have been found to be “inherently concerted”—namely, exchanges of information concerning (i) wages or wage differentials, (ii) changes in work schedules, (iii) job security, (iv) workplace health and safety, and (v) racial discrimination. GC 21-03 expressly warns that the NLRB will be considering such categories as well as “other applications of the inherently concerted doctrine” for the foreseeable future.

KEY TAKEAWAYS

- Employers should work with their counsel to ensure their workplace policies are compliant with the NLRA, including the expansive definition of protected conduct that will be enforced for the foreseeable future.
- Employers should expect an increase in NLRB oversight and NLRA enforcement.
- Employers should expect an increase in complaints brought by the NLRB, including increased prosecution of cases involving retaliation against concerted employee conduct.
- Employers should exercise caution when deciding whether or not to discipline or discharge employees who have engaged in discussions or activities related to workplace health and safety (importantly as related to the COVID-19 pandemic), social justice issues, or political views.

FOOTNOTES

¹ 367 NLRB No. 68 (2019).

² *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 153 (2014).

³ *Meyers Indus.*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. den. 474 U.S. 948 (1985).

⁴ *Meyers Indus.*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. den. 487 U.S. 1205 (1988).

KEY CONTACTS



ROSEMARY ALITO
PARTNER

NEWARK
+1.973.848.4022
ROSEMARY.ALITO@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.