Podcast Transcript

Vigorous Enforcement Ahead: Understanding and Preparing for the NLRB's Expanded View of Protected Concerted Activity

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Kattman: Protected concerted activity has been a hot topic in labor law, and that continues to be true. What is protected concerted activity and why should employers care about it? How does the NLRB's current leadership view protected concerted activity as compared to their predecessors under the Trump administration? I'm Amy Kattman and you're listening to BakerHosts.

On today's episode, Jeremy Hart, an attorney in BakerHostetler's Labor and Employment Group in Columbus, discusses what employers need to know about the National Labor Relation Board's expanded view of protected concerted activity. Jeremy will break down what this all may lead to for employers and how they can prepare for the general counsel's vigorous enforcement of this expanded understanding. Welcome to the show, Jeremy.

Hart: Hi Amy, it's great to be here with you.

Kattman: Protected concerted activity has been a hot topic in labor law, and that continues to be true. Jeremy, can you tell us what is protected concerted activity and why should employers care about it?

Hart: Sure, Amy. Section 7 of the National Labor Relations Act gives employees a number of different rights. It, for example, gives them the right to form and join labor unions. It gives them the right to engage in collective bargaining through a representative that they choose, and it also gives them the right to engage in other concerted activities for the purpose of collective bargaining or other mutual

aid or protection. That last piece is what is referred to as protected concerted activity, or PCA for short.

So traditionally, to be protected by Section 7, employee conduct has had to be concerted in the sense that the employee acted with or on the authority of other employees or sought to initiate group action. That concerted action must be for a specific purpose, though. Specifically, to be protected by Section 7, concerted employee conduct must be either for the purpose of collective bargaining or for other mutual aid or protection. So I want to focus on the latter purpose. Employees have traditionally acted for other mutual aid or protection when their action is linked to the workplace in an effort to improve the circumstances of their employment.

When an employee engages in PCA, their employer cannot discipline or terminate or take other adverse action against them because of their PCA without committing an unfair labor practice. All employers should understand this concept of PCA because it likely applies to their employees. If an employee is covered by the NLRA, which most private sector employers are, its employees are protected by Section 7 of the NLRA and have a protected right to engage in concerted activity. Some employers might be tempted to think that they don't have to worry about PCA because their employers aren't represented by a union, but that's just not the case, Amy. Employees have the right to engage in PCA regardless of whether they are represented by a union or not.

Kattman: President Biden has recently installed new leadership at the NLRB. How does the NLRB's current leadership view protected concerted activity as compared to their predecessors under the Trump administration?

Hart: Well Amy, the NLRB under President Biden is going to take a far more expansive view of protected concerted activity than it did under President Trump. This is really no surprise. Boards controlled by members appointed by Republican presidents tend to take a narrow view of PCA, while boards controlled by members appointed by Democrat presidents tend to have more expansive views on PCA. We're seeing this generalization hold true in the context of the transition from the Trump board to the Biden board.

Though President Biden has not yet appointed any new members to the board itself, he has nominated a new NLRB general counsel, that's Jennifer Abruzzo, who is awaiting confirmation, and he has appointed an acting general counsel, Peter Sung Ohr. The general counsel is very important within the scheme of the NLRB. This is the person that runs the board's regional offices and is the board's chief prosecutor, so this person's view on PCA significantly influences the board's enforcement of the NLRA, including PCAs. So just last month, Acting GC Ohr published a memorandum to the NLRB's regional offices discussing some of his rather broad views on protected concerted activities.

Kattman: Now what does Acting GC Ohr's guidance memorandum tell us about how the general counsel will approach PCA issues?

Hart: There are a couple things that we should take from Acting GC Ohr's guidance memo. The first I think is simply from the title. The title of his memo is Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection in Inherently Concerted Doctrines. I think it's notable that the Acting GC is encouraging vigorous enforcement of PCA issues in the very title of his guidance to the regional offices. Elsewhere in the memo, the Acting GC promises vigorous and robust enforcement of PCA rights, so Amy, this is a clear signal to employers that PCA is a priority issue for the board and when regions receive charges concerning PCA issues, they will aggressively investigate those allegations with an expansive view as to what kinds of conduct the Act protects. So employers are on notice.

This is in a flashing neon sign that the new GC and the new board will aggressively interpret and enforce Section 7 of the Act with respect to all employers, not just those with unionized work forces. Acting GC Ohr's memo also indicates that the kinds of conduct the Act will be considered to protect as PCA will significantly expand. So with regard to the mutual aid or protection piece of the PCA equation, the Acting GC explained that while employee conduct has generally been required to be for the purpose of improving employees' circumstances in their employment to be for mutual aid or protection in his view, employee conduct can be for mutual aid or protection even when employees have not directly connected their activity to the workplace.

As the Acting GC puts it, employee conduct that has a direct nexus to employees' interest as employees will be considered as being engaged in for purposes of mutual aid or protection under Section 7 of the Act. All the Acting GC is looking for here is some way, something, to tie an employee's activity to some employment-related interest. How tight that connection has to be is yet to be seen. Now additionally, with regard to the concerted piece of the PCA equation, Acting GC Ohr's memo reveals really an aggressive understanding of when an employee engages in concerted activity. So remember that historically, to engage in concerted activity, an employee must be acting with or on behalf of one or more other employees. There needs to be some element of group action involved for activity to be concerted, and Acting GC Ohr has told the regional offices that that's not necessarily the case.

According to the Acting GC, some employee discussion or conduct concerning what he calls vital elements of employment raise concerns that are so pivotal, so important to employee interests as a whole, that they are inherently concerted. And that's the case regardless of whether group action is contemplated at the time of the employee activity in question or not, and so essentially what the Acting GC is saying is that some topics of employee conversation are going to be concerted for purposes of PCA, even if only one employee is involved. For example, think of the context of a single employee complaining to a supervisor. What the Acting GC is saying is that if that employee addresses the supervisor concerning certain topics that are important to other employees, that single employee might be engaging in inherently concerted activity.

Kattman: Jeremy, can you provide some specific examples of employee conduct that haven't traditionally been protected by the NLRA, but that the General Counsel might consider to be PCA under his expansive view?

Hart: Absolutely. So, let's start with activity that will be viewed as being engaged in for purposes of mutual aid or protection, that is, for the purposes of improving employees' circumstances of employment. So obviously, if I'm an employee, and I and some of my coworkers confront our manager and we say manager, our pay is unfair. You barely pay us minimum wage, though we do good work. We can't pay our rent. We want an additional dollar per hour for our work. We are clearly engaged in conduct that is for the purposes of improving our lives as employees. That is, we engage in conduct for purposes of mutual aid or protection, but what if instead of addressing my supervisor about wages, I do an interview with a journalist about how earning the minimum wage affects me and my coworkers.

What if I tell that journalist that I can't pay rent on minimum wage and that I'm dependent on government assistance to feed my family? What If I tell the journalist that I and my coworkers are the reason the bill pending in my state's legislature to raise the minimum wage to $15 an hour really needs to pass? Have I engaged in activity for mutual aid and protection? Well, according to the Acting GC, I have, and this is even though my efforts were directed not toward my employer, but toward a journalist, who has no power over my wages. What if instead of doing that interview with the journalist, I ask for time off from work to attend a demonstration in support of a $15 an hour minimum wage? And when my request is denied, maybe for failing to give the required notice for time off under company policy, I decide to go on a solo strike and then I go and I attend the demonstration. Is my solo strike for the purposes of mutual aid and protection?

Well, according to the Acting GC it is. I can't be terminated or otherwise disciplined for my solo strike. What about if instead of wages, the issue is different? What if it's immigration? What if, though I'm not an immigrant myself, I miss work without permission to attend a rally supporting immigrants in the workplace? Is my conduct for purposes of bettering my lot as an employee so as to be for purposes of mutual aid and protection? Well, the Acting GC says yes, it is. The Acting GC explains the outcome in each of those examples by saying that in each instance, the employee conduct had the objective goal of improving their workplaces in concerned issues within their employer's control, like the payment of wages and the employer's willingness to hire immigrants, for example. So Amy, the question here is really where's the line? Is skipping work to attend, for example, a Black Lives Matter rally for purposes of mutual aid and protection? What about attending a Pride parade?

What about leaving work without permission to attend a Greenpeace rally advocating for the reduction of carbon emissions in manufacturing? What about writing an op-ed taking issue with your employer's government defense contracts? Given the Acting GC's view on when an employee engages in conduct for purposes of mutual aid or protection, any one or all of these instances may involve protected Section 7 activity for which the employee can't

be discharged or otherwise disciplined. And Acting GC Ohr, he states that a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act.

Kattman: Are there examples of conduct that might be considered inherently protected when it historically might not have been?

Hart: There sure are, Amy. So Acting GC Ohr states in his memo that employee conversations about things like wages, schedules and hours, and job security are all inherently concerted, so that means that employees may be engaging in protected activity when discussing these issues even if the employee appears to be acting only on their own behalf and not with or for any other employees. The Acting GC explains that other topics including workplace health, which of course is of paramount concern right now given the ongoing Covid-19 pandemic, safety and racial discrimination may also be inherently concerted, and states that he will be examining other appropriate applications of the inherently concerted doctrine going forward.

So really, your imagination here is the limit. The Acting GC is signaling that any topic that might be considered a vital part of workplace life and of concern to employees in general can be considered inherently concerted. As a result, employers may find the NLRB considering topics such as who they do or do not do business with, political action committees they donate to, their support or lack of support for social causes, and many other similar topics as inherently concerted for purposes of PCA.

Kattman: As a final question, can you tell us how can employers prepare for the General Counsel's vigorous enforcement of its expanded understanding of PCA?

Hart: Sure. So one of the silver linings for employers here is that the current Acting GC, and I expect General Counsel Abruzzo, to continue this when she is confirmed, is building off of advice issued during the Obama board. So all of the examples that we discussed were from advice memoranda issued in 2017, so many of these issues have been considered by the board in some capacity in the past, and these historic advice memoranda can be helpful in determining the kinds of activity the Biden board might find to constitute PCA. Certainly there will be new kinds of activity that the board finds to be protected, but the advice memoranda issued during the Obama board are really a good place for employers to start to get reacquainted with the kinds of issues the board might find to be protected concerted activity.

Beyond that, the name of the game for employers is going to be recognizing potential or probable PCA and intervening to ensure that employees are not being disciplined or adversely impacted for engaging in protected concerted activity. Once a PCA allegation gets to the region in the form of an unfair labor practice charge, it's going to be much tougher to defend given the Acting GC's approach. So employers should really emphasize training their managers and supervisors to recognize potential PCA and handle it appropriately. And admittedly there's an element of the unknown here because we don't know how

far the GC and regions will take this. But it's far better for employers to be proactive on this issue and provide solid and consistent training than to be reactive and deal with this issue only after a charge has been filed.

Kattman: Certainly that's true. Thank you very much, Jeremy.

Hart: Thanks, Amy. It was a pleasure being with you today.

Kattman: If you have any questions for Jeremy, his contact information is in the show notes. As always, thanks for listening to BakerHosts.