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# NLRB Memo Signals Expansion Of Workers' Protected Activity

By **Ashley Cano and John Phillips** (April 23, 2021, 1:55 PM EDT)

For many years, the direction of the National Labor Relations Board has oscillated depending on the political party of the majority of its members. As early as this coming fall, the new administration will be in a position to have three Democratic members on the board — a majority.

Once that happens, employers can expect the NLRB's approach to be dramatically different than it was under the prior administration. One area in particular where employers can expect a new approach is the enforcement — and likely expansion — of employees' rights to engage in protected, concerted activity.



Ashley Cano

## Quick Background on the NLRB

The NLRB interprets and applies the National Labor Relations Act, and the NLRB has two primary divisions: (1) the board itself, which comprises five members appointed by the president and confirmed by the U.S. Senate; and (2) the Office of the General Counsel, which investigates alleged unfair labor practices and prosecutes cases.

The general counsel is also appointed by the president and confirmed by the senate. The general counsel's office is thus vitally important to the function of the NLRB because it determines which cases to prosecute and has a large hand in setting the board's enforcement priorities.



John Phillips

## Protected, Concerted Activity Under the NLRA

Under Section 7 of the NLRA, both union and nonunion employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>[1]</sup> Employers cannot discipline, terminate or otherwise take adverse action against employees for engaging in activity protected by the NLRA.<sup>[2]</sup>

Traditionally, to qualify as protected, concerted activity, an employee's conduct must be both concerted, that is, joint or collective, and for the purpose of mutual aid or protection. In other words, in order to be protected, the employee must be engaged in activity that is intended to help the group, not just him or herself.

It likely comes as no surprise that Republican-appointed and Democrat-appointed board members have had different views on what constitutes concerted, protected activity.

For example, in January 2019, the NLRB — under a Republican majority — issued an important decision on what constitutes protected, concerted activity.<sup>[3]</sup> In that case, Alstate Maintenance LLC, a skycap at an airport had refused to assist customers with their luggage, telling his supervisor "we did a similar job a year prior and we didn't receive a tip for it," and the board held that he was not engaged in protected, concerted activity.

The majority reasoned that the skycap's activities were not concerted because his use of the word "we" was insufficient to signal his intent to bring a complaint on behalf of a group of employees and because the statement did not ask the employer to change its policy or take any other action.[4]

However, board member Lauren McFerran, a Democrat who was appointed chair of the NLRB in January 2021, wrote a scathing dissent in that case, strongly disagreeing with the majority's reasoning.[5] Importantly, McFerran's view may soon become the official view of the NLRB once a Democrat majority is in place.

### **Biden Replaces the NLRB General Counsel**

President Joe Biden did not wait until he could install a new board majority to begin to effect change at the NLRB. Instead, he immediately moved to change the direction of the general counsel's office.

Before Biden's swearing-in, the NLRB's general counsel was Peter Robb, who was appointed to a four-year term expiring in November 2021 by then-President Donald Trump. However, on Jan. 20, just minutes after being sworn in, Biden sent Robb a letter requesting his resignation.

When Robb did not resign, he was terminated, marking the first time a president terminated the services of the NLRB's general counsel. In Robb's place, Biden appointed Peter Sung Ohr, the longtime regional director of the NLRB's Chicago regional office, as acting general counsel.[6] In February, Biden nominated Jennifer Abruzzo to serve as general counsel, replacing Ohr; she has not yet been confirmed by the Senate.

### **Ohr Signals Intent to Vigorously Enforce — and Potentially Expand — the Right to Engage in Protected, Concerted Activity**

On March 31, Ohr **issued** to all of the NLRB's regional offices Memorandum GC 21-03, titled "Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines." [7]

In the memorandum, Ohr emphasized that protected, concerted activity can encompass more than what has traditionally been understood to be such activity. The memorandum signals Ohr's intent to expand the scope of such activity and to push the boundaries of current board law.

In the memo, Ohr stated that "employee advocacy can have the goal of 'mutual aid or protection' even when the employees have not explicitly connected their activity to workplace concerns." [8] In his view, this includes employees' political and social justice advocacy. [9]

In other words, the NLRB's acting general counsel is signaling to the regional offices that employees who are outspoken on certain political topics or on social justice issues may be protected by the act.

Ohr included several examples in the memo that are illuminating. For one, he noted that a single hotel employee's interview with a journalist about how the minimum wage affected her and employees like her constitutes protected activity. [10]

Another example was a single employee leaving work to attend a demonstration where she and others — but not others from her place of employment — advocated for a \$15 minimum wage. [11] And a final example was an employee protesting a crackdown on undocumented immigration and the possibility of workplace immigration raids. [12]

In the acting general counsel's view, the employees' conduct in each of these instances had the objective goal of improving their workplaces and concerned issues within their employer's control, such as the payment of wages and the willingness to hire immigrants, and was therefore protected by the act. [13]

The memo's discussion of "inherently" concerted activity also highlights Ohr's broad view of protected activity. In Ohr's view, there are certain topics that are inherently concerted because they necessarily impact employees' working conditions, even if the employee engaging in that conduct has not met with or discussed the topics with her fellow employees. [14] Some examples of those topics are wages, work schedules, job security, workplace health and safety, and race discrimination. [15]

## Takeaways for Employers

Although exactly how far the general counsel's office — under Ohr or Abruzzo following her confirmation — and a new board majority may take the interpretation of protected, concerted activity is unclear, the recent memo is a very clear signal that the general counsel's office intends to explore those limits.

This would mean that an employee does not necessarily need to be speaking about a topic that traditionally relates to working conditions in order to be protected, and an employee does not necessarily need to be engaging with other employees about the topic.

Instead, the mere discussion of political or social justice issues, such as race, immigration and the like — although not commonly thought of as implicating working conditions — may be deemed to constitute protected, concerted activity if there is a general nexus to employees' interests as employees.

Note, however, that the U.S. Supreme Court in *Eastex Inc. v. NLRB*[16] in 1978 required a direct correlation between the conduct or speech at issue and the workplace. This means there are limits on how far the NLRB can expand the protection of Section 7 of the NLRA.

As stated in Memo 21-03, even under the acting general counsel's expansive view of what constitutes protected, concerted activity, Section 7 protection still does not extend to employees' political and social justice advocacy unless the subject matter has a direct nexus to employees' interests as employees.[17]

It seems clear that the general counsel's office will be scrutinizing retaliation claims very closely, and may pursue charges against companies that discipline or terminate employees for engaging in social justice or similar-type activities — whether in the workplace, online, or to outside activist groups or journalists.

Employers should therefore be mindful whenever an employee is arguably engaging in activity that might be protected by the NLRA, such as social justice and political discussions, postings online and on message boards, and statements to the media. If an employer intends to discipline or terminate an employee for this type of conduct, it is important to consider the NLRB's shifting definition of protected, concerted activity before doing so.

Otherwise, an employer may end up being a test case for a new or expansive theory of protected, concerted activity before the NLRB.

Additionally, employers may want to review their social media, confidentiality and other policies in light of the NLRB's expected aggressive enforcement of Section 7 rights. Because it is likely that the new NLRB will find certain provisions in such policies to unlawfully infringe on employees' Section 7 rights, employers should consider examining those policies now, to likewise avoid being a test case before the board.

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[1] 29 U.S.C. § 157 (Section 7 of the Act).

[2] 29 U.S.C. § 158(a)(1) (Section 8(a)(1) of the Act).

[3] *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).

[4] *Id.* at \*4.

[5] Id. at \*11.

[6] NLRB Office of Public Affairs, News & Publications, Peter Sung Ohr Named Acting General Counsel (available at <https://www.nlr.gov/news-outreach/news-story/peter-sung-ohr-named-acting-general-counsel>) (last visited April 21, 2021). Many of the Acting General Counsel's actions are being subjected to legal challenge by employers that argue his appointment, and Robb's termination, was unlawful.

[7] Memorandum GC 21-03 (March 31, 2021).

[8] Id. at p. 2.

[9] Id.

[10] Id.

[11] Id.

[12] Id. at p. 2-3.

[13] Id.

[14] Id. at p. 4-6.

[15] Id. at p. 5-6.

[16] 437 U.S. 556, 564-65 (1978).

[17] Memorandum GC 21-03 at p. 2.

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