

PUBLICATION

NLRB Extends NLRA Protection to Discussions of Race in the Workplace

Authors: Grant M. Wills, Donna M. Glover
March 30, 2023

The National Labor Relations Board (NLRB) Office of the General Counsel publicly issued on February 27, 2023 an Advice Memorandum confirming the agency's view that workplace discussions about racism are protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). The memo is significant in that it demonstrates that the current NLRB considers retaliation against employees who have such workplace discussions to constitute an unfair labor practice under the NLRA, even for non-union employers. What do employers need to know about this development in federal labor law?

Background

The NLRB issued its memo in relation to a case involving a medical school in Pasadena, California. In that case, a physician engaged in group discussions with a group of students and fellow faculty members to discuss racial representation and racial bias in the medical field. The meeting also discussed an email that had been sent by the dean to faculty, staff, and students concerning a police shooting of a Black man near the medical school's campus that many members of the group had considered to be "triggering, tone deaf, and showed the Dean's implicit racial bias." During the group discussion, the physician wore a t-shirt reading "I can't breathe," a reference to words spoken by Eric Garner and George Floyd prior to their deaths in police custody. The physician also recommended that students read the book "White Fragility: Why It's So Hard for White People to Talk About Racism."

Some students reportedly became emotional and upset during the group discussions, which led to a medical school employee in the classroom interrupting the discussion, telling the physician that the discussion was inappropriate, and subsequently reporting what had been discussed to the medical school administration. The physician claimed that, in response, the medical school administration discharged her from her teaching duties, pending an investigation into her classroom activities. The physician also claimed that, following its investigation, the medical school reinstated her as a clinical physician, but did not reinstate her to the faculty. In addition, following her Twitter posts about the situation, she claimed that the medical school retaliated against her by reversing its offer to extend her contract and by permanently discharging her.

The physician filed an unfair labor practice charge with the NLRB alleging that the medical school retaliated against her in violation of Section 8(a)(1) of the NLRA for engaging in protected concerted activity.

Section 7 of the NLRA and Workplace Discussions About Racism

Section 7 of the NLRA protects workers at both unionized and non-unionized workplaces who engage in concerted activity for the purpose of mutual aid and protection. Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees who exercise their Section 7 rights, including the right to engage in protected concerted activities.

Employees who act in concert to raise common issues concerning wages, hours, or other working conditions are engaged in protected concerted activity for the purpose of mutual aid or protection, regardless of whether they are unionized. Protection will also apply where the activity is found to be "inherently concerted."

According to NLRB, the medical school violated Section 8(a)(1) because the physician's classroom discussion about issues of race faced by Black faculty and students, as well as systemic racism in medicine, was inherently concerted and was for mutual aid or protection. Further, the physician's tweets were protected concerted activity because they discussed terms and conditions of employment regarding racial disparities in medicine faced by medical professionals, sought the assistance of others to improve working conditions in medicine, and encouraged others to fight for racial equality and justice in the workplace.

As explained in the memo, employee discussions of certain "vital categories of workplace life," may render the discussions inherently concerted (and therefore protected under the NLRA) even if group action is not yet contemplated. In this regard, such discussions may be viewed as protected concerted activity, irrespective of whether other employees agree with the message or join in the employee's cause. Historically, the NLRB has held that employee discussions with coworkers about higher wages, for example, are inherently concerted and therefore receive statutory protection even where the discussions do not contemplate group action. In the memo, the NLRB extends this protection more broadly to workplace discussions of racism, finding that they constitute a matter of vital importance to employees and, consequently, also fall under the umbrella of inherently concerted activity.

Takeaways for Employers

Employers understand that workplace issues involving race are already within the territory of the Equal Employment Opportunity Commission (EEOC), the primary federal agency tasked with enforcing laws that prohibit harassment, discrimination, and retaliation in the workplace. The memo signals that employers—whether unionized or not—can now expect the NLRB to stake a claim in this area as well.

The memo is in line with a joint initiative between the EEOC, NLRB, and the U.S. Department of Labor that was previously announced in 2021. The joint initiative between these agencies seeks to raise awareness about retaliation issues when workers exercise their protected labor rights. A primary feature of the joint initiative includes direct collaboration between these agencies as to retaliation claims on the basis of protected activity, whether that activity arises under Title VII of the Civil Rights Act of 1964 (Title VII) or the NLRA. Notably, because the EEOC and NLRB possess the authority to refer cases to each other, a retaliation case originating with the EEOC could also result in a separate unfair labor practice charge before the NLRB.

Employers seeking to avoid enforcement action should understand that the NLRB under the Biden administration is taking an expansive view of what constitutes protected concerted activity under Section 7 of the NLRA. This now includes workplace discussions about racial discrimination, which the NLRB views as being inherently concerted.

Employee discussions involving societal issues such as race can be controversial and cause tension and conflict in the workplace. However, as the memo illustrates, if an employer takes an adverse employment action against one or more employees in response to such workplace discussion, the employer could be found liable for violating the NLRA even where the employer took such action for legitimate business reasons. Thus, from a practical standpoint, employers will face legal risk moving forward if they continue to analyze or address racial issues in the workplace solely from a Title VII perspective. In light of the memo, in instances in which issues of race arise in the workplace, employers should no longer limit their assessment to Title VII or other equal employment opportunity laws enforced by the EEOC when considering if there was a legitimate non-discriminatory and non-retaliatory reason for taking adverse employment action. Employers should analyze the circumstances of the situation at hand to determine if protected concerted activity is also implicated under the NLRA. Employers who fail to do so may now find themselves in the crosshairs of two federal agencies.

Although the advice memo does not establish binding precedent, it does provide valuable insight into the NLRB's thought process in reviewing unfair labor practice charges that may come before it. This memo is

particularly useful as a reminder for employers to be cautious when responding to workplace discussions involving race. For that reason, employers should train human resources personnel and supervisors to recognize protected concerted activity, establish a non-retaliatory action plan to de-escalate and address the underlying issues, and work closely with labor counsel when responding to workplace discussions involving racism and other societal issues.

Baker Donelson will continue to monitor these developments at the NLRB. If you have questions about this topic, reach out to [Grant Wills](#), [Donna M. Glover](#), or any member of Baker Donelson's [Labor & Employment Team](#).