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Can Employers get a Grip on Griping?

Not all Gripes are Created Equal…

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Negative employee attitudes, chronic complaining, insubordination and gossiping are bad for the workplace. They can impact employee morale and productivity, and if spread outside of the organization, reflect very poorly on that company. While employers should have appropriate written polices and promptly address employee griping and rudeness head on -- through investigations, frank discussions, performance reviews, enforcement of clearly delineated policies and procedures and disciplinary measures when necessary -- employers must tread carefully. Not all gripes are created equal. Some complaints constitute legally protected activity and efforts to curb them could run afoul of labor laws. If your managers are not properly trained to handle employee complaints and negative attitudes, they may quite literally turn annoying but manageable situations into federal cases.

Protected Griping

Both union and non-union employees have the right under Section 7 of the National Labor Relations Act to engage in activity for their "mutual aid or protection." In short, employees have a right to participate in "protected concerted activity" ("PCA"). This right has been interpreted broadly, with the main question focusing on the issue of being "in concert," i.e., not acting on behalf of oneself only.

As an employer, it is important to be aware of what constitutes PCA in order to ensure that such conduct is not punished in any way. Penalizing or suppressing PCA (and to an extent, even aggressively investigating it) can run afoul of Section 7 and expose an employer to damages for unfair labor practices. While in many cases concerted activity occurs among two or more employees, an individual employee may also engage in PCA. An employee's actions are concerted if the employee is acting on the authority of other employees, bringing group complaints or recommendations to improve pay or working conditions to the employer's attention, intending to induce group action, or seeking to prepare for group action.

Although the question of what is considered PCA under the NLRA has been recently narrowed,[1] employers should be mindful that the following activities could constitute PCA:

- Complaining to co-workers or even outsiders and the media about the company, its managers and workplace conditions;
- Posting negative or disparaging statements about the company's terms and conditions of employment or its treatment of employees on Facebook, Twitter and other social media;
- Discussing terms and conditions of employment, such as salary, bonuses, impending promotions and terminations with co-workers and outsiders;
- Investigating and asking questions about other employees' terms and conditions of employment;
- Speaking out on behalf of co-workers;
- Bringing a group complaint to management; or
- Failing to keep non-business sensitive information confidential, if it involves an element discussed above.

Best Practice for Investigating Protected Griping

Prior to punishing conduct which may be considered PCA, employers should non-coercively investigate the situation in order to ensure that an evaluation of "the totality of the circumstances" does not support a reasonable inference that in making the statement the employee was seeking to "initiate, induce or prepare for group action." The NLRB has emphasized on several occasions that the question of whether an employee is engaged in PCA is a factual one. Any inquiry should focus on the content and intent of the communications in question, and if there was any group action contemplated by the employees. If this is deemed to be the case, even a warning against further griping would be highly risky.

Thus, any interview of an employee perceived as lodging or otherwise engaging in conduct that might fall within the definition of PCA should be explicitly non-coercive and should include the following safeguards:

- Communicate the purpose of the questioning to the employee prior to the interview;
- Assure the employee that no reprisals will take place based upon the substance of any answer or refusal to answer any question; and
- Obtain the employee's permission to conduct the interview on a voluntary basis.

If such an investigation results in a determination that the conduct in question does not constitute PCA, caution should still be exercised. Depending on the conduct at issue, any disciplinary proceedings

[1]In Alstate Maintenance, 367 NLRB No. 68 (January 11, 2019) ("Alstate"), the NLRB held that an individual employee's complaint to his manager about the possibility of not receiving a tip was not PCA. The individual was later terminated for the comment. The comment was made in front of other employees, a fact that previously would have worked heavily in favor of PCA, but instead, the employee's complaint was deemed a "mere gripe." Alstate overturned the NLRB's 2011 holding in WorldMark by Wyndham, 356 NLRB 765, where a complaint made during a group meeting about a new dress code was held to be PCA on the basis that a public protest *ipso facto* means the initiation of group action. The NLRB's majority in Alstate rejected this reasoning on the basis that it "conflate[s] the concepts of group setting and group complaints," thus meaning that a complaint by an employee in a group setting should not automatically be considered PCA.

should contain a clear caveat that the employee is not prohibited from discussing the terms and conditions of his/her employment (for example, wages and hours) with others.

Avoid Over-Reaching Confidentiality and Social Media Policies

Make sure your social media and confidentiality policies are not overreaching. If a social media or confidentiality policy can be reasonably interpreted as having a "chilling effect" on protected activity, such as on employees' right to discuss their wages and other terms and conditions of employment with each other, this can amount to an unfair labor practice and subject the organization to penalties.

Best Practice for Dealing with Non-Protected Griping

If a determination is made that the conduct in question is not PCA, it is best to deal with it head on. In addition to addressing the conduct with the complaining employee individually, the employer should have a plan ready for the workforce as a whole in order to prevent negativity from infecting all employees. Here is where communication is key. Have an open door policy to promote feedback and direct flow of information in order to reduce the risk of further dissemination of potentially damaging information. The more employers listen to their employees and actively solicit feedback, the less likely the employees will be to complain to each other. In addition, set standards through documented policies. While you cannot control an employee's negative reaction, having documented consequences for failing to follow them will go a long way in insulating the company from retaliation claims. Always document insubordinate and disruptive behavior and carefully follow disciplinary policies.

Finally, of course, it all starts in the hiring process. Try, whenever possible, to identify negative individuals before extending an offer. Design your interview questions to elicit information about the candidate's past reactions to perceived unfairness, try to hire candidates who describe themselves as reacting constructively in difficult situations, and avoid those who simply complained – or even worse, are still complaining.

Protecting Your Business

Because the difference between protected activity and "mere griping" is not always obvious and is fact-specific, employers should carefully assess the factors that constitute PCA and whenever this is unclear, consult with experienced employment counsel. Employers should vet employee policies and procedures to ensure that they don't run afoul of Section 7 or any other labor laws. And policies that prohibit gossip, use of social media and discussing company activity should be carefully drafted to achieve their goals without limiting an employee's rights under applicable labor laws.

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