

## HRAGC LEGAL UPDATE

FEBRUARY 21, 2019

### FEDERAL

#### **NLRB Ruling on Protected Concerted Activity**

Section 7 of the National Labor Relations Act protects employees who engaged in certain activity to benefit their co-workers, “for the purpose of collective bargaining or other mutual aid or protection.” This may include trying to organize a union, seeking support for higher wages or pressing for improved working conditions. The National Labor Relations Board issued a ruling in January limiting what constitutes protected concerted activity, finding that “individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun.” The Board returned to a line of cases decided in the late 1980s and overruled key cases decided in recent years that conflict with those older cases (including the *Worldmark* decision in 2011). The case is *Allstate Maintenance, LLC* (367 NLRB No. 68), January 11, 2019.

The Board focused on the facts of the case. The employee, a skycap at Kennedy airport, complained in the presence of other skycaps and his supervisor about being asked to load the luggage for a soccer team because the last time they did it the skycaps were not tipped. They initially walked away, but ultimately loaded the bags. The Board determined, looking at “the totality of the circumstances,” that there was no evidence to “support an inference that an individual employee was seeking to initiate or induce group action.” The Board outlined the factors that would tend to support an inference:

- (1) The statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment;
- (2) The decision affects multiple employees attending the meeting;
- (3) The employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented;
- (4) The speaker protested or complained about the decision’s effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and
- (5) The meeting presented the first opportunity the employees had to address the situation, so that the speaker had no opportunities to discuss it with other employees beforehand.

The impact of this decision for employers is that not every employee complaint, even when about a group of employees, will be deemed protected concerted activity. It is instructive as it supports looking closely at the facts when determining whether a single employee engaged in protected activity. When taking adverse action against that employee, employers should continue to be cautious in assessing whether it could lead to an NLRB claim. Another aspect of this case is the Board signaled that certain traditionally protected topics (like wages and hours) may be revisited, so look closely at the facts and be mindful of the five factors outlined in this decision, to determine whether the employee who spoke up or voiced disagreement is protected under the Act.

#### **NLRB Ruling on Independent Contractors**

On January 25, 2019, the NLRB rolled back another line of decisions, this time regarding the test for who is deemed to be an independent contractor. The issue arose in the context of whether airport shuttle drivers could unionize, as the NLRB permits employees, but not independent contractors, to do so. In the case of *SuperShuttle DFW, Inc.* (367 NLRB No. 75), the Board overruled the 2014 decision in *FedEx*, relying heavily on the “significant entrepreneurial opportunity and control” they had over their incomes, for van drivers who owned their own vans, made their own schedules and exhibited other attributes of control over their businesses. The Board limited the emphasis on the extent of employer control. Once again, this shift is a factor for employers who maintain independent contractor relationships, but employers should be wary of placing too much reliance on this decision.

## EEOC Wellness Incentive Rules Rescinded

In response to a federal court decision invalidating the EEOC rules governing incentives for wellness programs, to show that programs were voluntary under the ADA and GINA, the EEOC formally rescinded the rules in December (just before the ruling became effective on January 1, 2019). Employers who implemented wellness incentives that tracked the EEOC's rules may question what to do. Consider whether to stay the course and await new EEOC rules that better state the explanation for its rules and how such programs can be deemed voluntary. If continuing, examine closely any situations that could be deemed involuntary or lead to a challenge.

## ADEA Ruling Limiting Act to Employees

The Seventh Circuit Court of Appeals ruled that the ADEA does not apply to job applicants who bring disparate impact claims. The Court ruled that applicants are not able to bring a claim for disparate impact as those claims are limited to current employees. Disparate impact claims are not focused on direct discrimination, but focus on employer practices that may have a discriminatory effect on older workers. The Seventh Circuit joins the Eleventh Circuit in limiting the ADEA in this way. It is unclear that other courts will follow and if the Supreme Court will take up the issue.

Employers should continue to monitor their hiring practices, including where and how jobs are posted as well as the requirements for consideration, to watch for disparate impacts on older workers.

## NEW HAMPSHIRE

Paid family leave is back at the State House. A new bill is making its way through the legislative and it has passed the Senate, while the Governor has a competing proposal. This and many other bills that could affect employers will be summarized next month.

## PRACTICE POINTER

### Best Practices for Workplace Safety

- Assess safety policies, practices, and attitudes-early and often
- Support the Safety Committee and give it vitality
- Encourage safety compliance in regular and meaningful ways
- Evenly and fairly enforce safety rules
- If using incentives, assess whether they can have a chilling effect on reporting injuries
- Take seriously concerns for workplace violence and promptly address them
- Consider whether law enforcement should be consulted

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