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Must Worker Avow Receipt of Discipline Form, Manual?

Employers often ask if they can require employees to sign forms acknowledging receipt of disciplinary documents or employee manuals. The answer is a qualified, "Yes." The analysis first requires a brief discussion of "concerted" and "protected" activity under the National Labor Relations Act (NLRA).

Concerted Activity

Section 7 of the NLRA gives employees the right to "engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection…." 29 U.S.C. §157. In *Meyers Industries, Inc.,* 281 NLRB No. 118 (1986), enf'd, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988), the National Labor Relations Board (the board) held that for activity to be concerted, the person must "be engaged in with or on authority of other employees, and not solely by and on behalf of the employee himself." 281 NLRB at 885. Concerted activities include "circumstances where the individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints…." Id. at 887. Compare *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978) (seeking to distribute a union newsletter in nonworking areas during nonworking time concerted activity); *NLRB v. Caval Tool*

Div., 262 F.3d 184 (2d Cir. 2001) (employee who challenged break policy during an employee meeting engaged in concerted activity); *Makua Inc.,* 327 NLRB No. 148 (1999) (work stoppage by one person concerted because it was "direct outgrowth" of his union activities and in protest of unfair labor practices); with *Eastex,* 437 U.S. at 567-68 ("some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity…at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual air or protection' clause."); *J. Shaw Assoc., LLC,* 349 NLRB No. 88 (2007) (employee who voiced personal complaints was not engaged in concerted activity); *Plumbers Local* 412, 328 NLRB 1079 (N.L.R.B. Div. of Judges July 29, 1999) (same). See also *Ewing v. NLRB,* 861 F.2d 353 (2d Cir. 1988) (approving *Meyers* test).

An individual employee's "reasonable and honest" assertion of a right under a collective bargaining agreement is per se concerted. *NLRB v. City Disposal Systems,* 465 U.S. 822, 837 (1984). In contrast, individual invocation of a statutory right is not necessarily concerted. *Meyers*, 281 NLRB at 888.

Protected Activity

Not all concerted activity is protected. To be protected, the "activity must be both 'concerted' in nature and pursued either for union-related purposes aimed at collective bargaining or other 'mutual aid or protection.'" The Developing Labor Law (P. Hardin and J. Higgins eds., 4th ed. 2001) at 176. Compare *NLRB v. Oakes Mach. Corp.,* 897 F.2d 84 (2d Cir. 1990) (employee of subsidiary who sent letter to parent company complaining that subsidiary president made employees work on his personal matters engaged in protected activity); *Office Depot,* 330 NLRB No. 99 (2000) (saying to customer's replacement worker, "oh, you work for the scab newspaper" protected); *Mid-Mountain Foods, Inc.,* 350 NLRB No. 67 (2007) (testifying at NLRB hearing protected); with *Media General Ops., Inc.,* 2007 WL 601571 (NLRB Div. of Judges Feb. 22, 2007) (inflammatory and profane-laden outburst rendered conduct unprotected); *Sprint/United Mgmt. Co.,* 339 NLRB No. 127 (2003) (e-mail to fellow employees saying that anthrax was found in building not protected because sender knew statements were not true,); *Abell Engineering & Mfg.,* 338 NLRB No. 42 (2002) (advising fellow employee about job opening with another employer and urging him to take it not protected); *Tradesmen Int'l, Inc. v. NLRB,* 275 F.3d 1137 (D.C. Cir. 2002) (testifying at hearing regarding employer's compliance with city bond requirement not protected).

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Against this background, we look at employee signature requirements.

Discipline Forms

In *Interlink Cable Systems,* 285 NLRB 304 (1987), the board held that the employees' concerted refusal to sign warning notices was not protected. Several nonunion employees were presented with written warnings for lateness. Each of the warning forms contained a space for the employee to sign under the words "I have read this notice and understand it." When the employees refused to sign, the manager told them they could not return to work until they signed. When they continued to refuse, he sent them home. The following day one employee agreed to sign the warning, and was allowed to return to work. See generally id. at 304-05.

The board found that although the employees acted in concert, refusing to sign the warning notices was not protected.

> The employees never spoke of or engaged in a strike, work stoppage, or some other form of self-help, where …such conduct is protected. Instead the groups' self-help consisted solely of defying [management's] orders. In effect, the group attempted to dictate for themselves which…conditions of employment it would observe. Id. at 306-07.

The decision notes that the employee's signature was not an admission, but merely an acknowledgment of having received the warning, and the warning form contained space for the employee to write his or her comments. Id. at 307.

In *Newark Paperboard Products,* 1997 NLRB LEXIS 490 (NLRB Div. of Judges June 16, 1997), nonunion employees were given written warnings and told they had to sign them before they could work. The employees refused to sign and left the premises. The administrative law judge (ALJ) found the requirement that the employees sign was lawful even though, unlike in *Interlink,* the warning form did not contain a nonadmissions clause and space for the employee's comments. Id. at *24-*25.

In contrast, in *Browning-Ferris Industries,* 306 NLRB No. 127 (1992), the board found the threat of discharge for refusal to sign a warning notice violated the NLRA because the warning itself was part of a plan to fire a union supporter. The board also contrasted the warning form with that in *Interlink,* noting that the notice before it did not have space for the employee to put his remarks, there was no statement that the employee was simply acknowledging receipt of the warning, and there was no predesignated space for the employee to sign. Id. at *28-*29. See also *Air Contact Transport Inc.,* 340 NLRB No. 81 (2003), enf'd, 403 F.3d 206 (4th Cir. 2005) (warning itself was an unfair labor practice, so employee's refusal to sign was not insubordination).

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Employee Manuals

In *NTA Graphics, Inc.,* 303 NLRB No. 155 (1991), enf'd in part, 983 F.2d 1067 (6th Cir. 1993), nonunion employees were given a policy manual and acknowledgment form. The manager told the employees to sign and return the form before reporting for work the next week, but did not mention any penalty for not signing. Two days later, the employer learned that a large number of employees had attended a union organizing meeting. The following work day, the employer announced that anyone who did not sign the acknowledgment could not work. Sixteen employees refused to sign and were not permitted to work; all other employees signed and were permitted to work.

The board found that the employer violated the NLRA by discharging the 16 employees, 15 of whom the employer knew had attended the union meeting. The board noted that the penalty for not signing was announced only after the employer learned that many pro-union employees opposed signing. Id. at 803. The board, however, specifically declined to determine whether the refusal to sign itself was protected activity. Id. n. 10.

In *Matheson Fast Freight,* 297 NLRB 63 (1989), the board found that the employer interfered with employees' §7 rights by distributing a policy manual that included a statement that the company was nonunion and requiring employees to sign an acknowledgment in which they agreed to comply with all company policies. *Accord Leather Center, Inc.,* 312 NLRB No. 83 (1993); *Hecks Inc.,* 293 NLRB 1111 (1989); *La Quinta Motor Inns,* 293 NLRB 57 (1989).

In contrast, in *Noah's New York Bagels, Inc.,* 324 NLRB No. 42 (1997), promulgation of the employee manual and signature requirement did not interfere with §7 rights where the manual merely stated the employer's preference and reasons to remain union-free, but also stated that federal law gave employees the right to join a union.

Conclusion

In the absence of an unfair labor practice related to issuance of the discipline or policy itself, employers may and should require unrepresented employees to sign properly worded acknowledgments of disciplinary action or policy statements. Employers with employees represented by a union should consult with experienced labor counsel to determine if a collective bargaining agreement or past practice gives employees the right to refuse to sign.