FRILOT LLC
ATTORNEYS AT LAW

Authored by:
Christopher Nunziato
Frilot LLC

No Group Effort, No Problem? *Not So Fast, Employers*

NLRB Broadens Protections for Solo Employee's Complaints

WHAT

On August 25, 2023, the National Labor Relations Board issued a ruling in *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023) that affects union and non-union employers.

WHY

The Board continued its recent trend of overruling precedent and, in doing so, blurred the line between protected activity and an individual employee's "mere griping."

ACTION

Employers should take note that an individual employee's complaint may be considered protected concerted activity under the NLRA.

In the NLRB's recent ruling in *Miller Plastics, Inc.*, 372 NLRB No. 134 (2023) ("*Miller*"), the Board once again overruled employer-friendly Trump-era precedent, returning to a "totality of the circumstances" test to determine when an individual employee's complaints should be considered "concerted activity." A significant effect of the ruling is that the Board's General Counsel will no longer have to show evidence of prior group discussions between employees on a topic to prove that an individual employee's conduct was protected.

I. BACKGROUND

In *Miller*, the employer, a manufacturing plant, terminated an employee for raising concerns about the employer's COVID protocols and decision to remain open for business. The complaint alleged that the employee had been discharged for engaging in protected concerted activity. The employer argued that COVID-related complaints constituted mere individual "griping," not protected concerted activity.

II. PRIOR LAW

In 2019, the NLRB handed down a ruling in *Alstate Maintenance LLC,* 367 NLRB No. 68 (2019) adopting a checklist of factors to determine whether an employee's complaints amount to protected concerted activity. This checklist narrowed the circumstances under which statements made by individual employees in front of their coworkers would be deemed concerted. Under *Alstate*, the Board required evidence of "group activities" - e.g., prior or contemporaneous discussion of a particular concern amongst multiple employees before an employee's individual raising of the concern would be considered protected concerted activity.

III. NEW LAW

In *Miller*, the Board returned to the rule that predated *Alstate* – finding that the question of whether an employee has engaged in concerted activity "is a factual one based on the totality of the record evidence." In doing so, the Board reasoned that activity at its inception involving only one speaker and one listener can be concerted because "such activity is an indispensable preliminary step to employee self-organization." The Board also ruled that group action that occurs *after* the employee's individual activity can be considered when determining whether the activity "relates to group action."

IV. POTENTIAL IMPLICATIONS FOR EMPLOYERS

With the Board's return to a more "holistic" totality of the circumstances test, it will be more difficult for employers to determine whether an individual employee's conduct or complaints could be considered a precursor to group action and, therefore, protected.

V. CONCLUSION

Employers should not assume that an employee's individualized complaints or conduct are unprotected simply because it does not appear to represent "group action." If an employee raises concerns that an employer suspects may be shared by other employees, there is a reasonable likelihood that the Board may consider the individual employee's activity to be protected activity under the NLRA. Accordingly, employers should be cautious and consult with counsel before taking adverse action against an employee for what might appear at first glance to be "individual griping."