Federal Labor Laws

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IV. Basic Rights of Workers and Unions under §7 – Protected and Unprotected Activity

A. Section 7 Rights of Workers and Unions

1. Section 7 Rights of Workers: The heart of federal labor law is § 7 of the LMRA, which states:

   Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 8(a)(3).[1]

2. The four broad categories of rights specified in § 7 are enforced through various procedures of the NLRB through provisions spelled out in other sections of the law. The four broad categories of rights are:

   a. The right to organize,

   b. The right to engage in collective bargaining,

   c. The right to engage in other protected concerted activity for purposes of mutual aid or protection, and

   d. The right to refrain, subject to legal union security agreements.

3. Breadth and limitations on § 7 rights.

   a. Certain aspects of § 7 apply only to traditional union activity, while other rights extend to nonunion workers as well.

   b. It is important to understand what is and what is not covered by this section. Many people tend to believe, erroneously, that the NLRB is an agency designed to remedy any unjust or unwanted treatment of workers.

[1] 29 USCA § 157.

c. Section 7 is essentially a limitation on management's traditional right to control the workplace. The courts have acknowledged management's right to discharge a worker for a good reason, a poor reason, or no reason at all as long as the provisions of the law are not violated.[2]

d. Nearly all rights of workers under § 7 may be expanded in the collective bargaining process. However, the bargaining process can also limit certain aspects of § 7.

4. While the interpretation of § 7 is important throughout the law, several critical issues are of general concern. The following issues are discussed in the outline sections identified:

a. The Board and the courts have determined that certain conduct is "unprotected" for purposes of § 7, even though the intent of the activity is clearly within the broad category of rights. The distinction between "protected" and "unprotected" activity is discussed in subsection B, *below*.

b. The interpretation of the concept of "concerted" activity has led to an important distinction between purely individual actions and collective actions of workers. This distinction is discussed in subsection C, *below*.

c. The third element relevant to determining whether action falls within the protection of § 7 is whether the purpose of the action falls within the scope of the law. There is an important distinction, for example, between actions of workers taken for purposes of “mutual aid or protection” and actions taken for reasons unrelated to the workplace.

d. The primary enforcement of § 7 rights is through the unfair labor practice provisions of § 8. The basic relationship between § 7 and § 8 is discussed in subsections D and E of this outline, *below*.

e. One significant limitation on the value of § 7 rights is the so-called "free speech" provisions of § 8(c). The implications of that section are discussed in this outline, subsection F.

B. Distinction between Protected and Unprotected Activity

1. The Board and the courts have determined that certain conduct is "unprotected" for purposes of § 7, even though the intent of the activity is clearly within the broad category of rights.

2. The effect of a determination that a worker or workers are engaged in unprotected activity is that they lose their status as employees for purposes of enforcing § 7 rights. This means that the employer is

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[2] *See, e.g.*, *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3rd Cir. 1942).

free to take disciplinary action against a person, even though the effect of that action may interfere with workers' legitimate activities. For example, an individual engaged in "picket line misconduct" may be disciplined even though the picketing is otherwise lawful.

3. Case IV-A: Protected/Unprotected Activity: The situations discussed in the following case help illustrate some of the problems in determining whether activity is "protected" for purposes of § 7.

Case IV-A: Protected/Unprotected Activity

In each of the following situations, discuss whether the activity is "protected" for purposes of § 7.

a. A group of workers in a union shop strike to protest unjust treatment by supervision. At the time of the strike, the workers are covered by a collective bargaining agreement, which contains a no-strike clause.

b. Seven unorganized workers walk out of the machine shop in which they are employed to protest the bitter cold working conditions in the shop.

c. In protest of a change from payment of a piece rate to an hourly wage, a group of workers slows down to do only so much work as they feel is adequate for the hourly rate they are being paid.

d. An office clerical worker signs a petition protesting the dismissal of a production worker. Part of the clerical's job includes secretarial work for the personnel manager.

e. A picketer at a legal picket line verbally threatens a strikebreaker who is crossing the picket line. No physical gesturing, with or without weapons, is involved.

a. *NLRB v. Rockaway New Supply Co.*[3] Wildcat strikes are generally considered unprotected activity. In this case, the employees work for a company with a negotiated no-strike clause. However, the specific terms of a contractual no-strike clause may determine whether the workers involved in a walkout lose protected status.[4] A walkout may also be protected if it is caused by the serious or flagrant unfair labor practices of the employer.[5]

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[3] 345 U.S. 71, 73 S.Ct. 519 (1953).

[4] *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

[5] *Arlan's Department Store*, 133 NLRB 802 (1961).

b. *NLRB v. Washington Aluminum Co.*[6] Even though this is an unannounced work stoppage it is protected. The workers are acting to protest conditions of work. If the workers had been covered by a contractual no-strike clause, it would be necessary to show that the conditions of § 502 applied.

c. *Elk Lumber Co.*[7] A slow down is unprotected, as are sitdown strikes, quickies and intermittent strikes. However, workers may not lose protected status if they are engaged in relatively short, one-time strikes or refusals to work.[8]

d. *NLRB v. Hendricks County REMC.*[9] This is protected activity. The actual issue in this case was whether the clerical was a "confidential" employee, which would have changed her status under § 7 even though the action was protected.

e. *Clear Pine Mouldings*.[10] Verbal intimidation, or threats of serious harm even without physical acts or gestures, held to be unprotected activity. The decision overturned a long-standing principle that words alone cannot constitute coercion.

f. The choice of words may also cause action of an employee to be unprotected if the employee crosses the line in the use of derogatory, obscene, or other forms of extreme language in reference to a representative of the employer. To determine whether such language is unprotected, the Board considers where the discussion takes place, the subject matter of the discussion, the nature of the worker's outburst, and whether the outburst was provoked by an employer unfair labor practice.[11]

C. Distinction between Individual and Concerted Activity

1. Certain activities have been held to be unprotected because the action is not considered "concerted" under the interpretation of § 7.

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[6] 370 U.S. 9, 82 S.Ct. 1099 (1962). *See, also, Robbins Engineering*, 311 NLRB 1079 (1993).

[7] 91 NLRB 333 (1950).

[8] *See, e.g., Northeast Beverage Corp*., 349 NLRB No. 110 (2007); *Richard Schubert Associates*, 222 NLRB 867 (1976).

[9] 454 U.S. 170 (1981).

[10] 268 NLRB 1044 (1984).

[11] *Atlantic Steel Co*., 245 NLRB 814 (1979). *See also, The Tampa Tribune*, 351 NLRB No. 096 (2007); *Waste Management of Arizona*, 345 NLRB 1339 (2005); *Stanford Hotel*, 344 NLRB 558 (2005).

Activities engaged in by an individual for pure self-interest are the clearest example of activities, which are not concerted.

2. There is an important distinction between activities of union workers exercising rights under a collective bargaining agreement, as compared to nonunion workers, for purposes of determining whether an individual's activities are considered to be concerted.

   a. For nonunion workers: Under the current board, individual actions by nonunion workers can be considered concerted only if the individual acts as the representative of coworkers.[12] While the level of authorization needed from coworkers to show that a spokesperson is acting on their behalf fluctuates, the Board has been relatively rigid in requiring some degree of authorization or evidence that the action of one worker is the logical outgrowth of protests by others.[13]

   b. For union-represented workers: Individual activity under a collective bargaining agreement, or the exercise of rights granted by a collective bargaining agreement, is concerted activity even if the individual is acting alone. Because the bargaining process is concerted, the individual activity is seen as an extension of that process. This is sometimes referred to as the *Interboro* doctrine.[14]

3. The double requirement that activities must be "concerted" and engaged in for "mutual aid or protection" has also caused problems. In the *Meyers Industries* cases, the worker involved lost protection under § 7 because the activity was not concerted, even though other workers would probably benefit from the individual action. In subsequent cases, the Board has held that even action that is concerted may not be protected if the activity is not pursued for purposes of mutual aid or protection.

   a. In one case, efforts of one worker to solicit the support of a coworker in pursuing a sexual harassment claim before a state agency was in question. The worker's action was concerted because she attempted to enlist the support of a

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[12] *Meyers Industries, Inc. (Meyers I)*, 268 NLRB 493 (1984), *rev'd subnom, Prill v. NLRB*, 755 F.2d 941 (DC Cir.), on *remand, Meyers Industries, Inc. (Meyers II),* 281 NLRB 882 (1986), *aff'd, Prill v. NLRB,* 835 F.2d 1481 (DC Cir. 1987), *reversing Alleluia Cushion*, 221 NLRB 999 (1975). For a discussion on how positions of the Board can change with its composition, *see e.g*., *Labor Law Journal*, vol. 41, pp. 659-663 and vol. 47, p. 80 – citing *Liberty Natural Products*, 314 NLRB 630 at n. 4 (1994) and *KNTV*, 319 NLRB 447 at n. 11 (1995).

[13] *Mike Yurosek & Son*, 306 NLRB 1037 (1992), *supplemented*, 310 NLRB 831 (1993), *enf'd*, 53 F.3d 261 (9th Cir. 1995).

[14] *City Disposal Systems v. NLRB*, 465 U.S. 822 (1984), upholding the principle established by the NLRB in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966).

coworker.[15] However, the Board determined that she was acting only to advance a personal claim and, as a result, failed to establish that her concerted activity was for "mutual aid or protection."[16]

b. For activity to fall under the concept of "mutual aid or protection," the activity must be reasonably related to the terms and conditions of employment of the workers involved.[17] The Board has applied this standard to determine that two nursing home employees that collectively called a state patient care hotline to report excessive heat in their employer's nursing home were not protected under § 7. Although they acted in concert, their action was motivated by their interest in patient care. Since they were complaining about conditions under which patients were treated rather than their own terms and conditions of employment, their action was not for "mutual aid or protection."[18]

4. Case IV-B: Concerted/Individual Activity: Some of the problems associated with the determination of whether activity is "concerted" for purposes of § 7 are demonstrated in the following cases.

Ohio Oil Co.[19] This is concerted activity because it is a group of workers. Collective action, even by nonunion workers, is considered to be concerted.

b. *Joanna Cotton Mills v. NLRB*.[20] This is not concerted activity because the worker is acting for purely personal reasons.

c. *See e.g., National Wax Co*.[21] This is not concerted activity. The person is acting strictly in his or her own self-interest.

d. *Meyers Industries*.[22] This is the controversial case in which the Board tightened the standards for determining whether activities are concerted.

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[15] *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3rd Cir. 1964). Efforts of one worker to induce collective action is concerted activity.

[16] *Holling Press, Inc*., 343 NLRB 301 (2004).

[17] *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

[18] *Waters of Orchard Park*, 341 NLRB 642 (2004).

[19] 92 NLRB 1597 (1951). *See also*, *Accurate Wire Harness*, 335 NLRB 1096 (2001).

[20] 176 F.2d 749 (4th Cir. 1949).

[21] 251 NLRB 1064 (1980).

[22] *Supra*, at n. 12.

e. *Salisbury Hotel*.[23] This is concerted activity under the "logical outgrowth" exception to the *Meyers Industries* rule. Although the individual acted alone, her action will probably be considered the logical outgrowth of the group complaint.

Case IV-B: Individual/Concerted Activity

For each of the following situations, discuss whether the activity is concerted for purposes of § 7:

a. A group of nonunion workers conduct a peaceful, informal protest against a decision of the employer to eliminate overtime work. The group has no authorization from the remaining workers to speak on their behalf.

b. An individual worker circulates a petition calling for the removal of a foreman because the worker has an individual grudge against that foreman.

c. An individual worker asks the supervisor to grant that worker a merit pay increase.

d. After a truck is cited for having faulty brakes, a worker reports the unsafe condition to the appropriate public service commission and refuses to drive the truck until it is repaired.

e. A number of workers have been complaining about the employer's lunch hour policies. Without any authorization from this group, one worker calls the Department of Labor to complain about this policy. The complaining worker is disciplined for her action.

D. Enforcement of § 7 Rights through § 8(a)(1)

1. As a general rule, if a worker or group of workers is engaged in activity which is protected under § 7, and the employer takes action against the worker or workers, the employer has violated § 8(a)(1).[24] That section makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of rights guaranteed by § 7."[25]

2. Because § 8(a)(1) is a general prohibition against employer interference with workers' rights, violations of any of the more specific unfair labor practice provisions also violates § 8(a)(1).

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[23] 283 NLRB 685 (1987). *See also*, *Every Woman's Place*, 282 NLRB 413 (1986).

[24] *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733 (4th Cir. 1998).

[25] 29 USCA § 158(a).

3. It is not critical that workers actually engage in protected activity. In some cases, an employer's action may be unlawful because it interferes with the willingness of workers to exercise § 7 rights.

4. Technically, an employer's motive is irrelevant for determining violations of § 8(a)(1).[26] The critical issue is the impact of the actions on the workers. Sometimes, however, this point evades the Board's consideration.

5. Some actions of employers are specifically sanctioned by the Board and courts, even though the clear effect is interference with workers' rights. For example, the employer's right to hire permanent replacements for economic strikers is clearly established[27] although hiring strikebreakers would almost certainly have a negative impact on the willingness of workers to exercise their § 7 right to strike.

E. Enforcement of § 7 rights through § 8(b)(1)(A)

1. The union unfair labor practice which corresponds to § 8(a)(1) is § 8(b)(1)(A) which makes it unlawful for a union to "restrain or coerce" employees in the exercise of § 7 rights.

2. Common situations in which § 8(b)(1)(A) violations may be involved include issues concerning the rights of non-members in an open shop, union activities directed toward strikebreakers,[28] and the duty of fair representation.[29]

F. The "Free Speech" Provisions of § 8(c)

1. One significant limitation on the § 7 rights of workers is the "free speech" provision of § 8(c). That section states that:

   > The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[30]

2. The effect of § 8(c) is to exempt "pure speech" from the regulation of the NLRB, for purposes of unfair labor practice enforcement. Specific applications of § 8(c) are discussed in Part II of these Outlines.

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[26] *NLRB v. Burnup & Sims*, 379 U.S. 21, 85 S.Ct. 171 (1964).

[27] *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 58 S.Ct. 904 (1938).

[28] *TIU, Local 212 (New York Telephone Co.)*, 278 NLRB 998 (1986).

[29] *Ryder Services, Inc.*, 305 NLRB 1146 (1992).

[30] 29 USCA 158(c).