

The New National (Labor Relations Act) Anthem

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No matter what view you hold on the "Stand, Sit, Kneel" National Anthem dispute, it could possibly be resolved by none other than the National Labor Relations Board. This week, Dallas Cowboys owner Jerry Jones said that any of his players who refuse to stand during the National Anthem will not be allowed to play. Enter Local 100 of the United Labor Unions, which represents workers in Texas, Louisiana and Arkansas. Local 100 filed an Unfair Labor Practice Charge against the Cowboys with the Board, alleging that Jones' comments are a violation of the National Labor Relations Act. Interestingly, Local 100 has no connection with the NFL or the players. However, *any* labor organization can file a charge under current Board precedent.

As reported in previous Client Alerts, it is a violation of the Act for an employer to threaten, coerce or intimidate employees in order to prevent them from exercising their rights to engage in "concerted activity." The Board itself explains:

The law we enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away.

Concerted activity exists when two or more employees act together to improve wages or working conditions. The actions of a single employee can also be concerted activity if he or she involves co-workers before acting, or acts on behalf of others. On the other hand, reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause employees to lose the concerted activity protection.

Recent Board cases show how far the Board will go to enforce those rights:

Baltimore, Maryland. A licensed practical nurse was fired after she complained to her boss that other employees received special treatment. The Board found the employer violated the Act and the nurse was reinstated with back pay.

West Caldwell, New Jersey. Supervisors held a meeting of all the company's employees, informing them that they were prohibited from discussing their pay increases. One employee did just that and was fired. The company and the employee settled, with the employee receiving \$25,000 in back pay.

Hartford, Connecticut. After a work-related incident, an employee criticized her supervisor in a Facebook post, which prompted other employees to reply to the posting. The employee was fired. The NLRB said that the employee was unlawfully fired for engaging in protected concerted activity. Prior to a hearing, the case settled.

The key question to the Board will be whether kneeling during the National Anthem is protected concerted activity. By engaging in this protest, are the employees trying to improve their working conditions or their pay?

Unless the case is settled, the Board will investigate the matter and decide whether it will file a Complaint against the Cowboys. If the action ultimately is deemed to be concerted activity, the Board's remedies run from a cease and desist order to reinstatement plus back pay for any employee economically damaged. While it is unlikely that a player will be suspended or dismissed over this divisive issue, it shows the tremendous influence that the Board's historic interpretation of "concerted activity" has on all workplaces.

If you have any questions related to the NLRB or labor law, please contact John K. Baker (bakerj@whiteandwilliams.com; 610.782.4913) or any member of our Labor and Employment Law Group for further assistance.

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