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LABOR AND EMPLOYMENT NOTES

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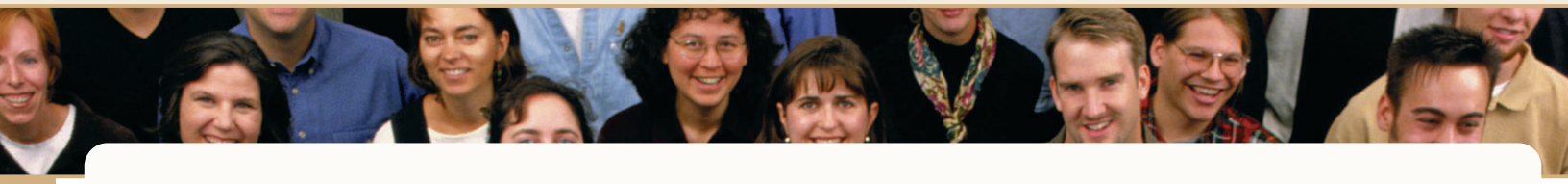

NATIONAL LABOR RELATIONS ACT: SECTION 7

Employees have many legal protections pursuant to both federal and state law. One provision which employers sometimes forget to consider is the National Labor Relations Act ("the NLRA"). Many covered employers assume that the NLRA cannot apply if their employees are not represented by a union. This is, however, incorrect.

One of the most important provisions of the NLRA is Section 7 which sets forth certain rights for covered employees. Section 7 provides covered employees with some "union related"protections - for example, the right to "form, join, or assist labor organizations." What surprises many covered employers; however, is another portion of Section 7 which refers to a right to engage in "concerted activities for the purpose of . . . mutual aid or protection." The actions of employees can sometimes fall within the scope of this right even if the employees are not represented by and are not seeking representation by a union.

The decisions of the National Labor Relations Board ("the Board") and courts show that whether protection will be afforded in a particular case typically depends on whether the following are true: (1) the activity was "concerted;" (2) the activity was for the purpose of "mutual aid or protection; "and (3) the type of activity, or the manner in which the activity was conducted, will allow for the protection of the NLRA.

It is important to note that activity can sometimes be found to be "concerted" even when engaged in by a lone employee. In the *Myers II* decision, for example, the Board adhered to a definition of concerted activity set forth in an earlier decision which indicated that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." This standard has allowed the Board and courts to sometimes find activity by a single employee to be "concerted." In *Mobil Exploration and Producing U.S. v. N.L.R.B,* for example, the Court of Appeals for the Fifth Circuit stated that "it is now well recognized that an individual employee may be engaged in concerted activity when he acts alone" in situations including "that in which the lone employee intends to induce group activity, and that in which the employee acts as a representative of at least one other employee."

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SEXUAL HARRASMENT LIABILITY FOR ACTIONS OF NON-EMPLOYEES

Employers are aware that their employees may sue them for sexually harassing conduct by one of their own employees. However, did you know that an employer may also be sued for sexually harassing conduct by a non-employee, such as a customer? For example, several employees of a supermarket sued their employer for damages they say arose from sexual harassment by a male patron, who frequented the store wearing white, see-through biking shorts. In another case, a blackjack dealer sued her casino employer alleging that it ignored her numerous complaints that customers were staring at and verbally abusing her. The good news is that employers can avoid liability by taking immediate corrective action once on notice of the inappropriate behavior.

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