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NLRB and Wal-Mart Face Off Over Strikes

From the Experts

Rebekah Mintzer

From making and dropping rules, to prompting U.S. Supreme Court cases about recess appointments and constitutionality, the National Labor Relations Board has generated plenty of attention in the past few months. One of its biggest recent actions is a complaint filed in January against Wal-Mart Stores Inc., accusing the retail giant of threatening or retaliating against employees who participated in protests against the company.

Wal-Mart fired back, stating in a response detailed in *The Wall Street Journal* that the employee protests are intended to disrupt business, and do not qualify as protected action under the National Labor Relations Act (NLRA), citing a lack of comprehensive notice provided by strikers to management.

The labor board's complaint consolidated the grievances of more than 60 employees, including 19 who alleged they were dismissed from their jobs due to protest activity. The Wal-Mart workers, who participated in protest actions across 13 states, also reported being threatened, disciplined and put under surveillance by management because of their roles in strikes.

"This is a novel case in terms of its breadth and scope," Donald Schroeder, a member at law firm Mintz Levin Cohn Ferris Glovsky and Popeo, told CorpCounsel.com.

One of the major questions implicated in the NLRB's complaint is whether or not intermittent strikes of the nature that the Wal-Mart employees engaged in do, in fact, count as protected concerted action under Section 7 of the NLRA.



Unlike a conventional strike, in which a group of employees might stay out of work for days or weeks until demands are met or a compromise is reached, Wal-Mart employees have been walking out during their shifts on a very short-term basis. Many of these intermittent strikes have been timed around heavy shopping days like the post-Thanksgiving "Black Friday."

Schroeder said he's not surprised that the NLRB has jumped at the opportunity to file a complaint about employer treatment of these types of protests. "The NLRB's foray into intermittent strikes isn't all that surprising in light of the territory that it has staked out in the social media context," he said.

Social media has allowed groups like Organization United for Respect at Walmart (OURWalmart), an advocacy group for Wal-Mart associates and the charging party in the

board's action, to initiate protest events like intermittent strikes on short notice even if the workforce is not unionized. The NLRB's moves to extend the amount of social media activity covered by Section 7, said Schroeder, give organized labor an important advantage.

"Do I think this is just another attempt by the NLRB to engage in a proactive agenda? Absolutely," he said.

The next step for Wal-Mart and the NLRB will be a hearing before an NLRB administrative law judge.

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