PUBLICATION

NLRB Says Individual Gripes About Wages are "Inherently Concerted" Activity

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Many employers consider it appropriate to discourage employees from discussing compensation with their coworkers. Particularly in non-unionized environments, employers may not think twice before disciplining employees for sharing salary information. Many may even have written policies enforcing these principles. The National Labor Relations Board (NLRB), however, strongly disagrees. This may come as a surprise to many, but the National Labor Relations Act has long made it unlawful for employers – both unionized and non-unionized – to interfere with employees' right to discuss the terms and conditions of their workplace, including the right to discuss pay and benefits.

The NLRB's December 2014 decision in *Alternative Energy Applications, Inc*. is a recent and useful reminder of the potential reach of this prohibition. (361 N.L.R.B. slip op. 139 (Dec. 16, 2014)). In this case, Alternative Energy Applications, Inc. (AEA), a company that provides building weatherization services, hired David Rivera-Chapman to work as a driver/installer. Soon after starting, Rivera-Chapman asked his supervisor for a raise. His supervisor granted him the raise, and in doing so, informed Rivera-Chapman that he was not to tell anyone else about it, "because we have fired employees in the past for talking about their wages." Notwithstanding this admonishment, a month into his employment AEA's president received a phone call from the mother of another AEA employee, complaining that her son had questions and concerns about his paycheck after discussing wages and overtime pay with Rivera-Chapman.

Rivera-Chapman proved to be a poor employee, and AEA terminated him after several performance issues arose a couple months into his employment. Rivera-Chapman filed a complaint with the NLRB, alleging that he was unlawfully terminated for engaging in protected concerted activity and that his supervisor's prohibition regarding discussing his pay raise constituted an unfair labor practice. The NLRB agreed, ruling that the supervisor's statement advising Rivera-Chapman not to discuss his raise constituted an unfair labor practice, and that there was sufficient evidence to find that AEA had terminated him, at least in part, because it believed he had discussed wages with other employees.[1] The NLRB made this finding despite the fact that there was no evidence that Rivera-Chapman's comments to other employees about wages were anything other than individual gripes. According to the NLRB, his gripes, even though not intended to initiate or support group action, were "*inherently concerted*" because they concerned wages.

As illustrated by *Alternative Energy*, even individual complaints employees may make to each other – without any intent to spur group action – are *per se* protected in the eyes of the NLRB. Accordingly, employers should ensure that they do not have any formal or informal policies or practices prohibiting employees from discussing wages with each other, and make sure that their managers are aware of the state of the law in this area.

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[1] Interestingly, part of the evidence the NLRB pointed to was found in a position statement AEA had submitted to OSHA in response to a separate complaint Rivera-Chapman had filed with the DOL. In its position statement, AEA argued that it did not terminate Rivera-Chapman because he had filed an OSHA complaint, but because, in part, he had "disclosed his rate of pay to other employees, prompting the mother of another employee to contact [AEA's president] and complain." This should serve as a warning to employers to ensure

that it is aware of the implications their statements to one federal agency may have on investigations conducted by another.