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NLRB to reconsider whether profanity is protected activity

By Stephanie M. Caffera

In recent years, the National Labor Relations Board has issued several controversial decisions holding that employees who used extremely profane or racially offensive language did not lose the protection of the National Labor Relations Act—and therefore could not be fired or disciplined for their conduct. We wrote about one of those cases previously. (You can read the previous alert here).

The NLRB has come under fire for those decisions, especially because some of their rulings have protected conduct that otherwise would be considered discrimination or harassment based on race or ethnicity. Other rulings have allowed conduct that, in any other context, surely would warrant termination. These rulings have undermined the ability of employers to promote "respectful" workplaces at the very time that the broader culture increasingly emphasizes the need for civility and respect of all individuals in the workplace. Employers have found themselves on the horns of a dilemma: to punish the conduct and risk violating the National Labor Relations Act or allow the conduct and risk violating Title VII of the Civil Rights Act of 1964.

The current NLRB has invited the public to comment on how they should balance the rights of employees who engage in "concerted activity" and the rights of employers to enforce policies on workplace civility, non-discrimination, and non-harassment. The public is invited through November 12, 2019 to submit briefs concerning how the Board should handle the issues raised by the following cases: *Plaza Auto Center*, 360 NLRB 972 (2014); *Pier Sixty, LLC*, 362 NLRB 505 (2015); and *Cooper Tire*, 363 NLRB No. 194 (2016). The Board will be accepting responsive briefs through November 27, 2019.

We will report on how the Board resolves this conflict.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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