

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation

Can I Stop Employees From Sharing Information About Their Pay?

Employees are gathering in the break room and asking each other how much they are getting paid!

Two employees were talking about their supervisor's decision to change their work hours over lunch!

That employee complained on social media about something that was not covered under our health plan and several other employees responded to the posting!

Can an employer stop an employee from discussing terms or conditions of the job, such as pay, benefits or working conditions, with others? You might be surprised to learn that the answer is generally **no!**

Employees have the right to engage in what is called “protected concerted activity.” *What is protected concerted activity?* Protected concerted activity occurs when two or more employees join together to address work-related issues. This activity can be as proactive as circulating a petition to seek better hours, or it can be as simple as discussing wages or employee benefits with co-workers.

Don't these restrictions only apply where there is a union or one is being organized? No – the National Labor Relations Act (“NLRA”), which is the law that addresses protected concerted activity, is not limited to workplaces with unions. In addition to union activities, the NLRA requires employers to allow employees “to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection.” Its coverage includes activity conducted by any employees, including employees of a nonprofit, whether or not there is a union or the employees are trying to organize one.

Employers cannot fire or otherwise discipline employees for engaging in protected concerted activity so long as the activity is (1) related to the terms and conditions of the job (such as salary, wages, hours, or working conditions), and (2) related to a group action or complaint. It does not matter whether the activity is conducted in person, online or through any other means.

Dated: 11/23/2020

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What is group activity? While determining whether the terms and conditions of employment are being discussed is fairly clear, determining whether group activity is occurring is more difficult. Please do not assume that one employee's expression of a complaint or concern is not protected concerted activity and comment on it or take disciplinary action without consulting with an attorney.

There is no clear definition of group action and the National Labor Relations Board ("NLRB") appears to make the determination on a case-by-case basis with frequent changes of position. At times, the NLRB has held that action by one person can be "group activity," particularly where the action is taken on behalf of a group or in seeking to induce group action. However, at other times the NLRB has held that action by one person is not protected. For example, the NLRB found that an employee's Facebook posting about her long workday was protected concerted activity because some of her co-workers commented on the post and the long hours they had been working. On the other hand, in a more recent case, the NLRB held that the comment of a skycap employee in front of other employees that they should not assist a soccer team with their luggage because they did not previously receive tips for similar work was held *not* to be protected concerted activity but was a personal grievance. The NLRB has provided some guidance about when an employee's statement might qualify as protected concerted activity as opposed to a personal grievance, including finding that a statement made in an employee meeting to challenge a management decision affecting terms or conditions of employment for a group of employees may be protected. Nevertheless, the issue is still not clear.

Should employers take action to stop employee comments or discussions? Employers should exercise extreme caution before commenting on employee communications, taking disciplinary action, or imposing other negative consequences on an employee who raises a concern about working conditions with other employees, or who discusses pay, benefits or other terms of employment with other employees. Because of the uncertainty in determining whether something can be considered protected concerted activity, it is best for nonprofits to err on the side of caution to avoid violating the NLRA.

Can an employer have policies that address employee comments or discussions in the workplace? In addition to using caution when addressing specific incidents that might occur, employers also must exercise care to ensure that their employee policies are not written in such a way that they discourage employees from communicating with each other about terms and conditions of employment. Some policies that have been scrutinized by the NLRB include policies addressing confidentiality and social media.

If you have questions about comments, posts or other communications by employees in the workplace or about your employee policies, please contact your PBPA attorney.