Squeaky COVID Wheel Doesn't Get The Grease

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Workplace complaints often can constitute protected activity under various labor and employment laws, including the National Labor Relations Act (NLRA). A recent advice memo released by the National Labor Relations Board (NLRB), however, illustrates some limits in this context.

At issue in the case was a bartender who expressed various complaints and concerns about their employment to management with respect to the COVID-19 outbreak. The employee complained that they should be paid for certain COVID-19 related cleaning responsibilities, that they disagreed with the employer's decision to not require masks for all employees during the pandemic, and that patrons were permitted to come into the establishment. There was no evidence the employee discussed any of these concerns with coworkers or expressed any group or concerted complaints.

The bartender ultimately told the company they would not return to work unless it altered its pandemic policies. The employee then was terminated for failure to come to work and subsequently filed a charge with the NLRB alleging they were terminated for protected, concerted activity (i.e., their various COVID-19 related complaints).

The NLRB's advice division disagreed. In finding there was no violation of the NLRA, the agency noted that the employee's "communications were not protected concerted activity because there is no evidence [the bartender] discussed these concerns with other employees or otherwise involved them in efforts."

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The key takeaway here is that for activity to be protected under the NLRA, an employee generally must be acting on behalf of a group or in concert with others. When an individual is raising purely personal concerns, it typically is not enough to carry the day. While companies should remain cautious when workplace complaints are made, this case shows some of the limits that may come into play in this area.