BARNES & THORNBURG LLP

NLRB: Filing An FLSA Collective Action Is Protected Concerted Activity

July 31, 2015 | | National Labor Relations Board,Labor And Employment

Gerald F. Lutkus
Of Counsel
(Retired)

The NLRB determined this week that an individual who filed a collective action FLSA claim in federal court was engaged in protected concerted activity – even if no other employees asked him to do it. NLRB Chairman Mark Gaston Pearce and Member Lauren McFerran agreed in the case of *200 E. 81st Rest. Corp.,* 362 N.L.R.B. No. 152 (7/29/15), that the individual employee's action was protected concerted activity and that the employer's post-filing firing of the employee violated Section 8(a)(1) of the National Labor Relations Act. Pearce and McFerran concluded that filing such a law suit and seeking class certification is an effort to induce group action that constitutes concerted activity. Though they acknowledged that the board has never been squarely presented with the question presented here, the two members relied upon the board's controversial decision in *D.R. Horton* to conclude that when individual files a class or collective action "regarding wages, hours or working conditions, whether in court or before an arbitrator," they are seeking to initiate or induce group action and are therefore engaged in conduct protected by Section 7. Board member Philip A. Miscimarra in dissent noted that while an employee and others might be engaged in protected concerted activity if they went together to file such a class claim, that is not the case here with the employee acting alone. Moreover, he concluded, "I believe Congress intended Respondent's conduct to be redressed pursuant to the FLSA." A copy of the decision is available here.

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)