



# Pennsylvania Conference of Teamsters

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# LEGISLATIVE ACTION ALERT

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NATIONAL LABOR  
RELATIONS BOARD

## NLRB Returns to Totality of Circumstances Test for Determining Concerted Activity

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Today, the National Labor Relations Board issued a decision in *Miller Plastic Products, Inc.* (decided on August 25th), returning to the long-established test for determining whether an employee who intends to induce group action by fellow employees engages in protected concerted activity under Section 7 of the National Labor Relations Act (the Act).

In its decision, the Board reaffirmed the principle—originally announced in 1986 in *Meyers Industries*—that “the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.” The Board overruled *Alstate Maintenance, LLC*, (2019), which effectively narrowed the test for determining concerted activity. The Board

explained that *Alstate Maintenance* had adopted an unduly restrictive test for defining concerted activity by introducing a mechanical checklist of factors in place of the Board’s traditional, fact-sensitive approach. This change imposed significant and unwarranted restrictions on concerted activity, undermining the goals of the Act.

“The right of employees to engage in concerted activity to improve their working conditions is central to the National Labor Relations Act. The Board should not artificially constrain the definition of concerted activity, as the *Alstate Maintenance* decision did. By returning to the Board’s traditional approach, we better protect employees who seek to improve their working conditions,” said Chairman Lauren McFerran.