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Employers' Response to Employee Political Advocacy Activities

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A. INTRODUCTION

Last spring, many employers experienced mass unauthorized absences from employees, who left their work in order to participate in nationwide and local demonstrations, organized to protest regulations and policies related to immigration, or to demand legislative action on this subject. Observers expect the continuation, and even an increase in, such employee activities in the foreseeable future. The NLRB General Counsel (GC) recently issued a Guideline Memorandum on the subject of employee political advocacy activities that may provide some guidance to employers.

The National Labor Relations Act (NLRA) protects, in part, employees' rights to engage in concerted activities "for mutual aid or protection." The National Labor Relations Board (NLRB) and the courts have long interpreted that protection to apply outside the confines of the traditional employment relationship. The GC Memorandum discusses employers' rights to restrict or discipline employees, when their political advocacy activities interfere or conflict with their job requirements.

This issue is significant to every employer. Therefore, human resources managers should be familiar with the factors the NLRB will consider in evaluating whether disciplinary action, taken by an employer, is a permissible exercise of the employer's right to enforce its work rules and regulations or whether such action constitutes an impermissible restriction on, or interference with, the employee's political advocacy activities and, therefore, is prohibited

In the GC's view, when evaluating whether an employer's actions are prohibited, the NLRB should examine: (1) "whether there is a

direct nexus between the subject of the advocacy and a *specifically* identified employment concern of the participating employees;" and (2) if such a nexus is found, whether the *means* used by the employees to carry out the advocacy renders the activity unprotected.[1]

B. THE SUBJECT OF THE ADVOCACY

Two decades ago, the Supreme Court recognized that the NLRA protected the right of employees to engage in concerted activities, "in support of employees of employers other than their own," as well as activities which "serve to improve their lot as employees through channels outside the immediate employee-employer relations."[2] Both the NLRB and the courts have made clear that employees' appeals to legislators and/or complaints and testimony before governmental and regulatory bodies constitute "protected" activities, provided that the substance of the employees' message is *directly* related to employee working conditions. Thus, employees' written communications, demonstrations, and/or testimony before legislative and regulatory bodies on issues such as influx of foreign employees,[3] safety rules for a particular industry,[4] staffing levels at healthcare institutions, [5] mandatory drug testing ordinances, [6] and environmental safety laws,[7] have been held to constitute concerted and protected activities under the NLRA.

On the other hand, employees' political complaints and activities before legislative and regulatory bodies that are not directly related to working conditions have been held not to be protected activities under the NLRA.[8] For example, expressions of concern over the safety of students of a school district and solicitations for the election of particular candidates, without reference to any employment related issue, are not protected.

C. THE MEANS TO CARRY OUT ADVOCACY

With respect to the means used by employees to carry out political advocacy, the NLRB has carefully scrutinized the nature of the activities in order to determine whether the NLRA protection applies. For example, the NLRB has held that activities such as demonstrations carried out during non-working time in non-working areas, and even certain types of strikes (not prohibited under union contracts) for the purpose of obtaining some improvement in working conditions, are protected means of carrying out the advocacy. However, when employees have engaged in conduct such as the unauthorized removal of documents in order to advance their concerted activities, the NLRB has not hesitated in holding the activity unprotected.[9]

D. IMMIGRATION DEMONSTRATIONS

As noted above, employers have recently seen employees take unauthorized absences from work to participate in marches, demonstrations, and other activities related to the immigration debate. In determining whether such activities are protected under the NLRA, the GC focused

1 *Five Star Transp.*, 349 N.L.R.B. No. 8; *Firestone Steel Prod. Co.*, 244 N.L.R.B. 826, 827 (1979), *enfd.*, 645 F.2nd 1151 (D.C. Cir. 1981); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

2 *Eastex, Inc., supra.*

3 *Kaiser Engineers*, 213 N.L.R.B. 752, 755 (1974), *enfd.*, 538 F.2nd 1379 (9th Cir. 1976).

4 *Riverboat Servs . of Indiana, Inc.*, 345 N.L.R.B. 1286, 1294 (2005).

5 *Misericordia Hosp. Med. Ctr.*, 246 N.L.R.B. 351 (1979), *enfd.*, 623 F.2nd 808 (2nd Cir. 1980).

6 *Motorola, Inc.*, 305 N.L.R.B. 580 (1991), *enfd., denied in part.*, 991 F.2nd 278 (5th Cir. 1993).

7 *GHR Energy Corp.*, 294 N.L.R.B. 1011, 1014 (1989), *enfd.*, 294 F.2nd 1055 (5th Cir. 1991).

8 *Five Star Transp., supra; Firestone Steel Prod. Co., supra.*

9 *See, Canyon Ranch*, 321 N.L.R.B. 937 (1996).

his Guideline Memorandum on the *means* used by the employees to carry out their activities. The GC concluded that, although there is a *direct nexus* between the substance of the issue (immigration policies) and legitimate employees' employment concerns (job security), the means used by the employees were not protected by the NLRA. Leaving their work without prior authorization by the employer, in order to participate in public marches and demonstrations, rendered the activity unprotected. In his view, such absences were not "*an economic weapon in the employment relationship*," because the underlying grievance of the employees was not one which the employer could address. Since the employer had no control over the outcome of the dispute, the use of this economic weapon was not a protected activity.

E. CONCLUSION

The NLRB General Counsel would authorize the issuance of complaints against employers whose actions restrict or interfere with employees' political advocacy activities that are related to specifically identified employment concerns of the employees, and which are not disruptive of the employees' work obligations. In general, employers are permitted to restrict such activities through non-discriminatory, neutrally applied rules designed to maintain workplace efficiency.

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