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NLRB Guidance on Employee Political Advocacy

In an election year with the possibility of a change in administration, and with the support of organized labor, a wide range of labor-related legislative and regulatory proposals have been introduced in the US Congress. We have also seen a rise in political activity by employees on issues linked to the workplace. Every employer — whether union or non-union — must be aware that the National Labor Relations Act (NLRA) may limit the employer's ability to discipline employees in connection with workplace issue-related political activity.

On July 22, 2008, the National Labor Relations Board (NLRB) General Counsel, Ronald Meisburg, issued a Guideline Memorandum to the regional offices on this topic. The NLRB's action was prompted by a series of cases challenging employer discipline of employees who had participated in nationwide and local demonstrations protesting pending legislative proposals that would impose greater restrictions and penalties on immigrant employees and their employers. The employees argued that participation in workplace issue-related political activity was protected activity under the NLRA, so they could not be disciplined for staying away from work to participate in such activities. Generally an employer cannot discipline or discharge employees who leave work without permission if such action is to obtain improvement in their working conditions. Some employers may be unaware that these restrictions apply even if the employer is non-union, and even if there is no union involvement in the activity.

In resolving the charges related to immigration demonstrations, General Counsel Meisburg assumed, but did not decide, that employee participation in the demonstrations was protected by the "mutual aid or protection" clause of Section 7 of the NLRA. The Guideline Memorandum describes, in three parts, the legal framework that the general counsel will follow in deciding whether discipline issued to employees in these circumstances was an unfair labor practice in violation of the NLRA.

The General Counsel's position is significant because it is the personnel under the General Counsel's supervision who are responsible for investigating unfair labor practice charges, issuing complaints and litigating cases before administrative law judges, the NLRB and the appellate courts. While the general counsel's office does not make the ultimate determination, employers will want to be aware of the litigation risk inherent in such situations.

Part I of the General Counsel's Memorandum examines NLRB jurisprudence in determining when employee political advocacy falls within the mutual aid or protection clause of Section 7. The test that will be applied, consistent with the US Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), "is whether there is a direct nexus between employment-related concerns and the specific issues that are the subject of the advocacy." The Memorandum concludes with a detailed analysis showing that the immigration demonstration cases fall within the scope of the mutual aid or protection clause as both "immigrant employees and even non-immigrant employees could reasonably believe that the proposed

bill could impact their interests as employees."

In reaching that conclusion, the General Counsel refers to language in *Eastex* that employees are protected under Section 7 when they engage in concerted activities "in support of employees of employers other than their own" or to seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." However, the General Counsel "cautioned against extending this principle so far that nearly all forms of political activity — no matter how attenuated from employees' workplace interests — might be deemed protected."

The Memorandum provides specific examples from cited cases (visas for foreign workers, the minimum wage, a right-to-work provision, engineer licenses, hospital staffing levels, "living" wages and benefits, employee drug testing, and workplace and environmental safety laws) where the NLRB held that appeals by employees to legislators or governmental agencies were protected activities when the substance of those appeals was directly related to employee working conditions. The Memorandum cautioned, however, that "complaints to governmental bodies that do not involve working conditions are not protected under the 'mutual aid or protection' clause."

Part II of the General Counsel's Memorandum discusses when political advocacy within the mutual aid or protection clause is in fact protected conduct in light of the means employed to carry out that advocacy. Several principles are set forth in the Memorandum based upon the General Counsel's analysis of NLRB precedent:

- "Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonwork areas, is protected."

- Such on duty political advocacy "…is subject to restrictions imposed by lawful and neutrally-applied work rules."

- Leaving or stopping work to engage in such political advocacy may also be subject to restrictions imposed by lawful and neutrally-applied work rules.

The Memorandum suggests that absences due to either leaving work or not going to work at all in order to attend an immigration demonstration could be considered a strike and, therefore, protected (even without union involvement). On the other hand, the Memorandum states that employees who leave work in support of a political cause to either mobilize public sentiment or to urge governmental action are acting outside their employers' control and that such conduct may not be protected activity in light of language in *Eastex*. The General Counsel pointed out that this view is consistent with decisions in secondary boycott cases where employers are protected from economic pressure in controversies over which they have no control, even when such economic coercion is applied by their own employees. Other examples of unprotected activity include "partial" or intermittent strikes, sit-down strikes and work slowdowns.

Finally, Part III of the General Counsel's Memorandum provides instructions and guidance to the regional

offices for the processing and investigation of charges involving employee political advocacy.

Our objective in this Client Alert is to raise awareness that, in any workplace — whether union or non-union — legal issues could arise under the NLRA when dealing with employees who choose to engage in workplace issue-related political activity. For guidance about any particular situation, further analysis is required.

For inquires related to this alert, please contact the authors, Bob Bloom (rbloom@mayerbrown.com or +1 312 701 8854) and Marcia Goodman (mgoodman@mayerbrown.com or +1 312 701 7953).

For information about Mayer Brown's Employment practice, please visit www.mayerbrown.com or contact Bob Davis at rdavis@mayerbrown.com, Julian Roskill at jroskill@mayerbrown.com, or Duncan Abate at duncan.abate@mayerbrownjsm.com.