

NLRB ISSUES GUIDANCE MEMO ON POLITICAL ACTIVITY AS PROTECTED CONDUCT

By Judd Lees

In response to employer uncertainty about disciplining or even discharging employees participating in nationwide and local demonstrations such as the recent May Day rallies in opposition to immigration reform, the General Counsel of the National Labor Relations Board recently issued a Guidance Memorandum. The guidance provided in the Memorandum may prove helpful to employers – both union and non-union – especially as the current political season heats up and the potential for employee activity at the worksite, or, more importantly, away from the site when the employee is supposed to be working, increases.

According to the Guidance Memorandum, there are two issues reviewed by the Board in dealing with employee political activities. First, Section 7 of the Act protects employee rights to engage in concerted activity for “mutual aid or protection.” Second, in the event the employee political advocacy falls within the “mutual aid or protection” clause, the Board will determine whether the means employed to carry out the advocacy is protected under federal labor law. According to the Guidance Memo, the broad “mutual aid or protection” net touches a surprising amount of employee activity. It does not necessarily require that the employee activity support fellow employees but could be implicated with activity in support of employees of other employers. In addition, the “mutual aid or protection” objective does not require the employee to use intra-company channels; it could involve appeals to agencies and other actors outside the employee/employer relationship.

The primary requirement is that the substance of the activity be directly related to employee working conditions. For example, employee complaints about maintenance of working conditions may be protected activity; employee complaints on behalf of students served

by the employer may not be. Similarly, nursing employees who complain about staffing levels may be engaged in protected activity; nursing employees who complain about the quality of patient care are not. According to the Memo, the “mutual aid or protection” provision requires that “the Board looks to whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees.” When that test was applied to the May Day rallies, the General Counsel determined that the activity was for employee “mutual aid and protection” since employees could reasonably believe that proposed legislation would impact their welfare as employees.

With regard to the second requisite element of “means,” however, General Counsel determined that walk-outs to participate in rallies might not be protected under the Act. While strikes are generally protected under federal labor law, according to the Guidance Memo, employees engaged in walk-outs to mobilize public sentiment or to urge government action are not withholding their services as an economic weapon in their employment relationship since the employer cannot address the grievances which are the basis for the walk-out. In addition, the General Counsel relied on a number of cases in which discipline of strikers was deemed lawful when the employees suddenly went on strike and failed to take reasonable steps to protect employer interests from the foreseeable harm resulting from a strike.

The Guidance Memo closes with the following principals: (1) “non-disruptive political advocacy” occurring during the employees’ own time and in a non-work area is protected if the matter at issue is related to an identified employment concern; (2) political advocacy occurring during work time or in work places which, again, relates to an employment concern, may give way to lawful and nondiscriminatory work rules; and (3) leaving work to engage in political advocacy may also be subject to lawful and nondiscriminatory work rules, even if the advocacy

relates to a specifically identified employment concern. As a result, employers should review their work rules to determine whether they conform to the Guidance Memo and make whatever changes are appropriate since the memo provides much-needed clarity in a very murky area. The memo may be found by clicking [here](#).