

## **NLRB General Counsel Issues Guidelines On Political Advocacy In The Workplace**

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On July 22, 2008, the Office of the General Counsel for the National Labor Relations Board ("NLRB" or the "Board") issued General Counsel Memorandum GC 08-10 to all of the NLRB's Regional Directors, Officers-in-Charge, and Resident Officers setting forth the General Counsel's guidelines concerning the handling of Unfair Labor Practice ("ULP") charges involving political advocacy.

The memorandum was issued in response to the numerous ULP charges filed in late 2006 and beyond by employees disciplined after their participation in demonstrations protesting legislative proposals imposing greater restrictions and penalties on immigrant employees and their employers. The purpose of the memorandum is "to provide guidance to employees, unions, and employers in this important and developing area of the law." Specifically, the memorandum sets forth a framework for the NLRB Regional Directors and their personnel to review, consider and rely upon in the processing of all ULP charges involving political advocacy. The guidelines set forth within the memorandum are especially pertinent to employers in light of the upcoming presidential elections and the continued national debate on immigration reform.

One of the most significant aspects of the issues addressed in General Counsel Memorandum 08-10 is the fact that they are not limited in their applicability to workplaces where employees are or may be seeking to be represented by a union. In fact, the memorandum recognizes that "political activity," like much other employee activity protected by the Act, can and does occur when employees, acting together, engage in conduct that concerns their terms and conditions of employment.

### **Political Advocacy That Is Protected**

Under Section 7 of the National Labor Relations Act (the "Act"), employees have the right to engage in concerted activity for their "mutual aid or protection." The NLRB and the United State Supreme Court have interpreted this provision as protecting employees not only when they engage in activity concerning their own immediate

terms and conditions of employment but, as well, when they engage in political activity that is "in support of employees of employers other than their own" as well as when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship."

However, the Board and the courts have held that there are limitations on the protection of political activity under the Act and that for an employee's political activity to be held protected there must be "*a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees.*"

For example, employee activity in connection with appeals to legislators and governmental agencies, such as those in connection with the 2006 pro-immigration rallies, have been held to be protected so long as the subject matter of those appeals relate directly to employee working conditions. Other examples of protected activities include appeals to governmental agencies regarding employee working conditions, wages, health benefits and safety concerns.

In contrast, unprotected activities include complaints to governmental bodies regarding issues unrelated to employees' working conditions as well as activities that are purely political – e.g., calls for the election of a particular slate of candidates without reference to specific employee problems.

### **Political Advocacy Must Be Engaged By Proper Means**

Even if a particular political advocacy falls within the "mutual aid or protection" category, it must still be conducted by appropriate "means" in order to qualify for the Act's protection. As such:

- 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 non-work areas, is protected;
- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally applied work rules; and
- leaving or stopping work to engage in political advocacy for or against a specific issue, even if related to a specifically identified employment concern, may be subject to restrictions imposed by lawful and neutrally-applied work rules and unprotected by the Act because it is violative of such rules provided they are enforced in a consistent and non-discriminatory manner.

In other words, political advocacy that is not disruptive of work operations and that occurs during non-work time and in non-work areas is generally protected. However, on-duty political advocacy that is disruptive may be unprotected. For example, security guards who provided no notice and walked off of work at government buildings (on the anniversary of the Oklahoma City bombings) were not protected under the Act. In

contrast, security guards at public housing sites who gave sufficient notice of their walkout (and whose posts were all covered by substitutes) were protected under the Act.

## Conclusion

While on-duty political advocacy can adversely affect workplace productivity, employers should take solace in the fact that disruptive actions can be curbed with lawful, neutrally-applied policies regarding non-work activities in the workplace.

At this juncture, it is important for employers to review their applicable policies and practices to ensure their neutrality and effectiveness. Employers that do not have such policies should consider that they are a very effective first line of defense against ULPs and potentially expensive litigation. Management should consider contacting experienced counsel for guidance on drafting and implementing such policies. Employers should also remain mindful of the fact that when employees seek access to the means of government, whether by petition, demonstration, or other conduct supportive of positions on issues in the public debate, they may also be engaging in concerted activity with respect to their terms of employment, to which the Act's protections may apply.

The full text of the NLRB's Memorandum GC 08-10 is available online from the NLRB's website: [http://www.nlr.gov/research/memos/general\\_council\\_memos.aspx](http://www.nlr.gov/research/memos/general_council_memos.aspx).

If you have any questions regarding Memorandum GC 08-10 and its impact upon your workplace, please contact:

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