ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

AUGUST 2008

The General Counsel of the NLRB has issued a Guideline Memorandum describing a framework for analyzing unfair labor practice charges involving discipline of employees who have engaged in political advocacy. As this year's political climate continues to heat up in advance of November's presidential election, employers need to be prepared for their employees voicing opinions on a range of challenging political issues.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

Labor Management A Littler Mendelson Newsletter

Can a Bumper Sticker Get You Bumped? NLRB's General Counsel Issues Guidelines on Political Advocacy

By Frank W. Buck and Richard L. Sloane

Background

Employers across the country were suddenly forced to address the issue of political advocacy in the workplace when rallies were held on May 1 of last year to protest U.S. immigration policies. Workers left their jobs to take part, and both employers and the National Labor Relations Board were uncertain about how to respond. Were these work stoppages protected by the National Labor Relations Act, and, if so, to what extent? There were no definitive answers.

Further, as we approach this presidential election season, political passions are rising to a fever pitch, and some of these issues may spill over into the workplace. Hot button issues such as immigration, health care, and spiraling costs of food and gasoline can flow into the workplace as employees wear buttons, circulate petitions, engage in rallies, send emails, blog, or post messages on websites. What can and should an employer do to limit the effect of such actions on productivity and morale?

On July 22, 2008, NLRB General Counsel Ronald Meisburg issued guidelines describing a framework that the Board will use in analyzing ULP charges involving discipline of employees who engage in political advocacy. The General Counsel's Memorandum, which was a response to the Board's treatment of ULPs resulting from demonstrations surrounding immigration legislation, is intended to assist employers, employees, and unions in determining what kind of political activity is protected by the "mutual aid or protection" clause of Section 7 of the NLRA, and what actions employers may take to ensure a productive workplace.

In effect, the Memorandum outlines a two-step process. First, the Board will determine whether the political advocacy qualifies as concerted activity for "mutual aid or protection" under Section 7 of the NLRA. More particularly, the Board will examine "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." However, the analysis does not end there. Second, the General Counsel's Memorandum notes that qualifying political activity can still lose the protection of the NLRA if it is carried out by unprotected means. Employees engaging in political activities while on duty - including leaving or stopping work to engage in such activity - are "subject to restrictions imposed by lawful and neutrally-applied work rules" and may be disciplined, at least where the employer has no control over the outcome of the political issue. Therefore, if a group of employees walk off the job to protest national immigration policies, that activity is not protected and may be the subject of discipline, if the employer has appropriate, neutral work rules that are applied evenly.

Bases for the Guidelines

In formulating these guidelines, the General Counsel drew upon U.S. Supreme Court and Board precedent. Notably, in *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978), the Supreme Court endorsed the Board's position that employees are protected under Section 7 when they engage in concerted activities "in support of employees of employers other

than their own" or seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." At the same time, however, the Court cautioned that this standard was not without limits - that is, at some point, the concerted activity may become so attenuated from employees' workplace interests that it can no longer properly be characterized as falling under the "mutual aid or protection" clause.

By way of example, there are several cases in which employee appeals to legislators or government agencies were found to be protected activity because those appeals were directly related to employee working conditions. Issues falling in this protected category include visas for foreign workers, minimum wage, right-to-work provisions, engineering licenses, hospital staffing levels, "living" wages and benefits, employee drug testing, and workplace and environmental safety standards.

The General Counsel's Memorandum was clear, however, in noting that under existing case law, "complaints to governmental bodies that do not involve working conditions are not protected under the 'mutual aid or protection' clause." Thus, school bus drivers who raised concerns about working conditions did engage in protected activity, while other drivers who sent letters to the school district raising more general concerns about student safety did not. Similarly, nurses who issued complaints about staffing levels were protected by the NLRA, while those who complained about the quality of patient care were not. Along these lines, distribution of materials supporting certain political candidates "without reference to any particular employment-related issues or advocating the creation of a workers' party are too attenuated" from the employment relationship to enjoy protection under Section 7.

While the General Counsel drew upon existing case law and the statute itself in order to fashion the first part of his test, he developed the second part of the test based upon a mere comment ("dicta") from the Supreme Court suggesting "that economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the outcome of that dispute." Thus, while passing around a petition at lunch time over a political issue could be protected, a work stoppage or slowdown over the same issue would lose that protection if the employer has no control over how the political issue would be resolved. Although the second part of the test has only marginal support in case law, employers can be relatively confident - at least as long as the Meisburg Memorandum remains in effect - that the General Counsel's office of the Board will not prosecute cases against employers that discipline employees for politically motivated strike activity where the employer has no control over the outcome of the political issue involved.

Recommendations

The recently issued guidelines offer some insight as to how the General Counsel's office of the Board will evaluate charges involving the question of whether political advocacy is protected under Section 7 of the NLRA. In light of these guidelines - and in recognition of the fact that the political winds will continue to blow (though who knows in which direction) - employers should consider the following:

- Be careful in disciplining any employees for political advocacy. In addition to the concerns raised by the General Counsel's Memorandum, keep in mind that discipline for political advocacy may also be attacked under anti-discrimination laws as well as other state and local laws.
- If you encounter a political issue gathering momentum in your workplace, determine the cause being advocated, whether or not that cause relates to the employment relationship, and whether or not the political advocacy may extend to any actions resembling a work stoppage or other economic pressure on the employer.
- An employer may discipline employees for engaging in political advocacy where the subject of the political advocacy has no nexus with a specific employment concern.
- An employer may also discipline for political advocacy that has resulted in a disruption to the employer's operations, where the employer has no control over the outcome of the political issue.
- Consider adding a clause to your "no solicitation/no distribution" policy stating that political advocacy may not be conducted in a manner that is disruptive to the employer's operations where the employer has no control over the resolution of the political issue.
- Be creative in addressing employee political action; sometimes rules are less effective than dialogue and discussion, particularly in heated situations.

Frank W. Buck is a Shareholder in Littler Mendelson's Cleveland office. Richard L. Sloane is an Associate in Littler Mendelson's Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Buck at fbuck@littler.com, or Mr. Sloane at rsloane@littler.com.