OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM GC 08-10

DATE: July 22, 2008

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy

In late 2006, we considered a series of charges involving discipline of employees who had participated in nationwide and local demonstrations organized to protest pending legislative proposals that would impose greater restrictions and penalties on immigrant employees and their employers. Consideration of those cases prompted a review of agency law and policy in political advocacy cases. This Guideline Memorandum describes this review and the framework we will use to consider these issues when they arise in the future.

In Eastex, Inc. v. NLRB, the Supreme Court endorsed the Board's view that employees are protected under the "mutual aid or protection" clause of Section 7 when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship."[1] At the same time, the Court 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.[2] The important question of where, and on what basis, to draw the line between protected concerted activity and unprotected political activity can be a difficult one.

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[1] Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978).

[2] Id. at 567-568 ("at some point the relationship [between employees' concerted activity and their interest as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause").

As a matter of enforcement policy under the Act, we do not want to equate political disputes with labor disputes, or promote the use of strikes and similar activity for resolving what are essentially political questions. To do so would "endorse the expansion of labor disputes in a way that is contrary to our national policy favoring the limitation of labor disputes to the primary parties."[3] At the same time, we are bound to follow Supreme Court and Board precedent recognizing that certain employee political advocacy is protected activity under the Act. The purpose of this memorandum is to set out a framework for harmonizing our enforcement policy with that precedent, and thereby provide guidance to employees, unions, and employers in this important and developing area of the law.

Part I of this memorandum examines the Board jurisprudence determining when employee political advocacy falls within the "mutual aid or protection" clause of Section 7.[4] The test that the Board has set forth, consistent with Eastex, is whether there is a direct nexus between employment-related concerns and the specific issues that are the subject of the advocacy. To illustrate how this test should be applied, we will examine recent advocacy regarding immigration law reforms.

Part II contains a discussion of whether, assuming that the object of the political advocacy at issue is within the "mutual aid or protection" clause, that advocacy is protected because of the specific means employed. We will review the various activities in which employees might typically engage and consider when the employees' activity is protected.

Finally, Part III contains instructions for processing charges involving political advocacy. Regions will submit all such cases to the Division of Advice with a recommendation as to whether a complaint is warranted under the analytical framework and discussion set forth in this Memorandum.

## I. Determining When Political Advocacy Falls Within the "Mutual Aid or Protection" Clause of Section 7

### A. Established Board Law

[3] Abbott Northwestern Hospital, 343 NLRB 498, 508 (2004) (Member Meisburg, concurring in part) (footnote omitted).

[4] This memorandum does not address the issue of concert and assumes that the political activities discussed herein are concerted activities.

Section 7 of the Act protects, *inter alia*, employee rights to engage in concerted activity for "mutual aid or protection."[5] The Board has long extended this Section 7 protection beyond the confines of the employment relationship to concerted political advocacy when the subject of that advocacy has a direct nexus to employee working conditions.

Thus, over thirty years ago, the Board held that a Kaiser Engineers employee who wrote to members of Congress on behalf of his fellow employees, opposing a competitor company's efforts to obtain resident visas for foreign engineers, was engaged in protected activity under Section 7.[6] The letter was motivated by a concern that an influx of foreign engineers would threaten U.S. engineers' job security and therefore was for the "mutual aid or protection" of the Kaiser engineers and their "fellow engineers in the profession."[7]

The Supreme Court upheld this approach in Eastex,[8] concluding that the "mutual aid or protection" clause protects employees 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."[9]

In numerous subsequent cases, the Board has found that employee appeals to legislators or governmental agencies were protected, so long as the substance of those appeals was directly related to employee working conditions.

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[5] 29 U.S.C. § 157.

[6] Kaiser Engineers, 213 NLRB 752, 755 (1974), enfd. 538 F.2d 1379 (9th Cir. 1976).

[7] Ibid. (letter writer's forced resignation violated Sections 8(a)(3) and (1)).

[8] See Eastex, Inc. v. NLRB, 437 U.S. at 566, n.16, citing, *inter alia*, Kaiser Engineers, 213 NLRB 752 (1974).

[9] Id. at 564-565 (upholding Section 7 protection for distribution of literature urging employees to vote for candidates supporting federal minimum wage increase and to lobby legislators to oppose incorporating right-to-work statute into state constitution).

A common situation involves employee complaints or testimony to regulatory bodies. In one such case, charging parties' letters to the Coast Guard requesting that their employer, a casino boat operator, be required to hire only engineers with unlimited licenses, in an effort to insure a wage floor and their safety, were protected as "an attempt to better their terms and conditions of employment."[10] Similarly, employee complaints to a hospital accreditation commission concerning staffing levels and the number of patients assigned to each staff member were also protected as matters "intimately related to the conditions under which the employees worked."[11] And, a union's intervention before state environmental and other regulatory permit proceedings to "'force construction companies to pay their employees a living wage, including health and other benefits,'" was "undisputedly protected" because it was designed to expand union job opportunities and further employee health and safety.[12]

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[10] Riverboat Services of Indiana, Inc., 345 NLRB 1286, 1294, 1297 (2005) (employer violated Section 8(a)(1) by discharging letter writers).

[11] Misericordia Hospital Medical Center, 246 NLRB 351, 356 (1979), enfd. 623 F.2d 808 (2d Cir. 1980) (employer violated Section 8(a)(1) by discharging one employee who lodged such complaints and by threatening the others). Accord Frances House, Inc., 322 NLRB 516, 522-523 (1996) (employer violated Section 8(a)(1) by interrogating employees and threatening reprisals for writing letter to state department of health regarding training, inappropriate assignment of work, and documentation falsification required in the course of their work duties, since employees were "concerned about their own conditions of employment").

[12] Petrochem Insulation, Inc., 330 NLRB 47, 49 (1999) (citation omitted), enfd. 240 F.3d 26 (D.C. Cir.), cert. denied 534 U.S. 992 (2001) (employer violated Section 8(a)(1) by filing baseless, retaliatory lawsuit to enjoin union's activity). See also Tradesmen International, Inc., 332 NLRB 1158, 1159-1160 (2000), enf. denied 275 F.3d 1137 (D.C. Cir. 2002) (union organizer's testimony to municipal board that nonunion contractor was subject to bonding requirement was protected, because union sought to level the field between union and nonunion contractors and therefore "there was a nexus" between the testimony and the job opportunities of unionized employees). The D.C. Circuit denied enforcement, finding insufficient evidence of a nexus to employee-related matters. 275 F.3d at 1142.

In some instances, the employees' political advocacy takes the form of an appeal to the governmental agency with which their employer has contracted to perform services. For example, in Five Star Transportation, Inc., the Board held that school bus drivers who sent letters to the school district, raising "[e]mployment-[r]elated [c]oncerns" that the new contractor-employer would not maintain its predecessor's working conditions, engaged in protected activity.[13]

As already noted, the Board has also found employee appeals to legislators protected under the "mutual aid or protection" clause.[14] In Motorola Inc., an employer prohibited the distribution of literature containing suggested messages to the city council supporting a proposal to ban mandatory drug testing.[15] The Board found that the literature was "directly related" to working conditions; therefore, a ban on its distribution anytime and anywhere on the employer's property violated Section 8(a)(1).[16] Similarly, in Union Carbide Corp., the employer violated Section 8(a)(1) by barring the circulation of a petition calling upon Congress and the President to investigate Union Carbide's use of government funds for anti-union activities.[17] And in GHR Energy Corp., the

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[13] Five Star Transportation, Inc., 349 NLRB No. 8, slip op. at 6 (2007), enfd. 522 F.3d 46 (1st Cir. 2008). See also North Carolina License Plate Agency # 18, 346 NLRB 293, n.4 (2006), enfd. 243 Fed. Appx. 771 (4th Cir. 2007) (employees engaged in protected activity when they threatened to file a complaint about wages, bonuses, and unequal treatment with the DMV, with whom their employer had a contract, because, *inter alia*, the subject matter of the complaint was "directly related to the employees' working conditions").

[14] See Kaiser Engineers, 213 NLRB at 755.

[15] Motorola, Inc., 305 NLRB 580, n.1 (1991), enf. denied in pert. part 991 F.2d 278 (5th Cir. 1993).

[16] Ibid. The Fifth Circuit denied enforcement on the grounds that employees involved were acting as members of an outside political organization. 991 F.2d at 285. This approach is questionable, as the Court focused on the status of the groups involved rather than the substance of the advocacy.

[17] Union Carbide Corp.-Nuclear Division, 259 NLRB 974, 977 (1981), enfd. in pert. part 714 F.2d 657 (6th Cir. 1983) (petition was "directly related to employee working conditions as affected by their right to organize").

employer violated Section 8(a)(1) by threatening to sue an employee based upon his testimony before a U.S. Senate committee and state environmental agency concerning environmental safety laws.[18]

In contrast, complaints to governmental bodies that do not involve working conditions are not protected under the "mutual aid or protection" clause. Accordingly, while the school bus drivers in Five Star Transportation who raised concerns about the maintenance of working conditions did engage in protected activity, other drivers who sent letters to the school district raising more general safety concerns on behalf of students did not.[19] Likewise, nursing employees who informed state agencies about staffing levels were protected,[20] but those who complained about patient care quality were not.[21]

In the same vein, distribution of "purely political tract[s]" that call for the election of a particular slate of candidates without reference to any particular employment-related issues[22] or advocate the creation of a workers' party are too attenuated from "employees' problems and concerns *qua* employees" to constitute activity for "mutual aid or protection."[23]

These cases generally articulate a test for determining when political advocacy falls within the "mutual aid or protection" clause: the Board looks to

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[18] GHR Energy Corp., 294 NLRB 1011, 1014 (1989), enfd. mem. 924 F.2d 1055 (5th Cir. 1991) (the relevant environmental laws had a "direct impact on the working conditions of employees handling toxic materials").

[19] 349 NLRB No. 8, slip. op at 3.

[20] Misericordia Hospital Medical Center, 246 NLRB at 356.

[21] E.g., Waters of Orchard Park, 341 NLRB 642, 643-644 (2004) (telephone call to state health department patient care hotline); Autumn Manor, 268 NLRB 239, 244 (1983) (testimony at state health department relicensing hearing).

[22] Firestone Steel Products Co., 244 NLRB 826, 827 (1979), enfd. 645 F.2d 1151 (D.C. Cir. 1981) (ban on distribution did not violate Section 8(a)(1) where leaflets bore no relation to employee problems and concerns as employees).

[23] Ford Motor Co., 221 NLRB 663, 666 (1975), enfd. mem. 546 F.2d 418 (3d 1976).

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.[24] This is the test that we will apply to determine when employee political advocacy falls within the "mutual aid or protection" clause.

B. Application to Current Political Advocacy Concerns

In the immigration demonstration cases that engendered this Guideline Memorandum, we assumed, and therefore did not decide, that employee participation in the demonstrations was protected by the "mutual aid or protection" clause of Section 7.[25]

Although it was not necessary to resolve the issue in those cases, it is clear from the analytical framework set forth above that participation in such demonstrations did in fact fall within the scope of the "mutual aid or protection" clause. These demonstrations were in protest, *inter alia*, of proposed legislation that would require prospective employees to obtain a variety of clearances before they could work in this country and would mandate that prospective employers verify each employee's paperwork or risk steep penalties.[26]

Over a period of several months, thousands of employees across the country, many of them immigrants, took time off from work to attend rallies and, in many instances, to also demonstrate through their absence from work the role of immigrants in the workforce. These

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[24] Five Star Transportation, Inc., 349 NLRB No. 8, slip op. at 6.

[25] See, e.g., Applebee's Neighborhood Bar & Grill, Case 30-CA-17444, Advice Memorandum dated Oct. 17, 2006 (charge dismissed because employees walked off the job without permission); Reliable Maintenance, Case 18-CA-18119, Advice Memorandum dated Oct. 31, 2006 (employee violated neutral attendance policy); La Veranda, Case 4-CA-34718, Advice Memorandum dated Nov. 15, 2006 (employees walked off the job without permission); CALMAX, Inc. d/b/a Chevy's, Case 32-CA-22651, Advice Memorandum dated Nov. 30, 2006 (employees violated no-call/no-show rules); Fire Fab, Inc., Case 32-CA-22668, Advice Memorandum dated Dec. 4, 2006 (layoff in response to employer's economic condition, not political demonstration).

[26] Ibid.

demonstrations focused upon pending legislation that both supporters and detractors agreed were designed to eliminate the employment of illegal immigrants. Moreover, many observers predicted that the potential penalties would cause employers to forgo hiring even lawful immigrants in order to avoid inadvertent violations.[27] Protesting employees therefore were concerned by predictions that employers would decline to hire immigrant employees altogether rather than risk violating the proposed law. In this manner, the proposed legislation could directly affect their job opportunities and job security. This is the same type of concern that was the focus of the protected employee political advocacy in Kaiser Engineers.[28]

In sum, immigrant employees and even non-immigrant employees could reasonably believe that the bill could impact their interests as employees.[29] For these reasons, employee attendance at and support of these demonstrations in our view was within the scope of the "mutual aid or protection" clause.[30]

## II. Determining When Political Advocacy Within the "Mutual Aid or Protection" Clause Is Protected in Light of the Means Employed

Once we have determined that a particular political advocacy falls within the "mutual aid or protection" clause, we must then ascertain whether the means employed to carry out that advocacy is protected. For instance, it is well established that political advocacy of employment-related matters that is engaged in during nonwork time in

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[27] See, e.g., Ted O'Callahan, *Small-Business Owners Lend Support at Immigration Rallies*, (April 10, 2006), http://www.inc.com/news/articles/200604/immigration.html.

[28] 213 NLRB at 755.

[29] Non-immigrant employees who "make cause with" a fellow immigrant worker over "his separate grievance" are protected under the "mutual aid or protection clause," even if their own interests are not implicated. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942).

[30] This observation does nothing which would change the result in any of those previous cases, since we assumed without deciding in each of them that the activity was protected. As discussed below, however, that protection could be lost depending on the means taken by the employees to engage in such activity.

nonwork areas typically may not be the subject of employer discipline absent disruption of work operations[31] or interference with the "right of employers to maintain discipline in their establishments."[32] It is also well established that discriminatory enforcement of facially valid work rules or past practices, based upon the content of protected conduct, also is violative of the Act.[33] The immigration demonstrations, however, involved a different problem -- leaving or absenting oneself from work to attend a political demonstration. Demonstrations like these present a different question because, though their subject is related to employee working conditions, the immediate employer may lack the ability to address the underlying grievance. The question then is whether to treat these absences as strikes under the NLRA.

In Erie Resistor, the Supreme Court examined the legislative history of the Wagner Act's "repeated solicitude for the right to strike," and found that this "solicitude" rested upon the view that the strike "is an economic weapon which in great measure implements and supports the principles of the collective bargaining system."[34] Thus, the strike is a "'lawful instrument'" in the "'economic struggle ... between employer and employees as to the share or division between them of the joint product of labor and capital.'"[35] For this reason, an

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[31] See, e.g., Eastex, Inc. v. NLRB, 437 U.S. at 572-576; Motorola Inc., 305 NLRB at 580, n.1; Union Carbide Corp., 259 NLRB at 977. Cf. ANG Newspapers, 343 NLRB 564, 565 (2004) (newspaper's legitimate interest in protecting its credibility against the appearance of conflicts of interest justified the minimal restraint posed by the admonishment of a reporter who, while off-duty, attended City Council meeting to lobby for support of the union).

[32] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

[33] See, e.g., Treanor Moving & Storage Co., 311 NLRB 371, 371-372 (1993) (discriminatory enforcement of attendance policy); Hialeah Hospital, 343 NLRB 391, 392 (2004) (strict enforcement of a previously unenforced rule requiring employees to leave the premises after clocking out).

[34] NLRB v. Erie Resistor Corp., 373 U.S. 221, 233-234 (1963).

[35] Id. at 234 (citing American Steel Foundries v. Tri-City Council, 257 U.S. 184, 209 (1921); Staff Rep. of S. Comm. on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.) 20, reprinted

employer generally cannot discharge or discipline employees who leave work without permission if their walkout is for the purpose of obtaining some improvement in their working conditions from their employer.[36]

However, when employees leave work in support of a political cause, either to mobilize public sentiment or to urge governmental action (in either case a matter outside their employer's control), they are not withholding their services as an economic weapon in the employment relationship. It is primarily because the employees' underlying grievance is not usually one which their employer can address that the employees' conduct, while resembling a strike, is distinctly different from the typical strike specifically protected under Section 13. Indeed, in Eastex the Court in dicta suggested 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.[37] We agree with that principle.

The principle that employees' concerted economic activity is protected only if directed at an employer who has control over the subject matter of the dispute is fully consistent with the analysis applied in secondary boycott cases. In those cases, employers are shielded from economic coercion in controversies that they have no right to control, even if that economic coercion is exerted by

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in 1 Legislative History of the National Labor Relations Act, 1935, at 1344 (1959)).

[36] NLRB v. Washington Aluminum Co., 370 U.S. 9, 15-17 (1962). See also, e.g., Accurate Wire Harness, 335 NLRB 1096, 1110 (2001), enfd. 86 Fed. Appx. 815 (6th Cir. 2003) (protesting failure to receive wage increase, evaluations, an up-to-date manual, policies regarding medical leave, and meeting with management); Vemco, Inc., 314 NLRB 1235, 1241 (1994), enf. denied 79 F.3d 526 (6th Cir. 1996) (protesting potentially hazardous or at least inaccessible assembly area).

[37] See Eastex, Inc. v. NLRB, 437 U.S. at 568, n.18 ("'The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within "mutual aid or protection" is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.'") (quoting Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. Pa. L. Rev. 1195, 1221 (1967)).

their own employees.[38] Similarly, the Board has held that employers who refuse to hire individuals engaged in an economic strike against another employer violate Section 8(a)(3), because "[t]o hold otherwise would endorse the expansion of labor disputes and the accompanying use of economic weapons in an unprecedented manner."[39] Since misdirected economic coercion is unlawful under Sections 8(a)(3) and 8(b)(4)(B), arguably, similarly misdirected economic coercion in the context of political advocacy may not be protected under Section 7.[40]

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[38] NLRB v. Enterprise Association of Steam Pipefitters Local 638, 429 U.S. 507, 525-526, 529-530 (1977) (subcontractor's employees refused to install climate-control units in order to put pressure on general contractor and to claim work that the immediate subcontractor employer had no authority to award); Elevator Constructors Local 91 (Otis Elevator Co.), 345 NLRB 925, n.4, 928-929 (2005) (employees refused to work for subcontractor employer where disputed demolition work had already been performed by nonunion subcontractor at general contractor's direction).

[39] Abbott Northwestern Hospital, 343 NLRB at 502 (Abbott Northwestern and other hospital employers unlawfully refused to employ striking Fairview Hospital nurses, in order to influence outcome of bargaining dispute between the nurses and Fairview).

[40] The law regarding sympathy strikes is not to the contrary. The proviso to Section 8(b)(4) expressly protects sympathy strikers, and that statutory language and the legislative history of the Taft-Hartley Act reflect the fact that "[r]efusals to cross picket lines have long been considered an integral part of primary strike activity." Getman, *supra* note 37, at 1228. An employer may permanently replace but may not discharge sympathy strikers. Torrington Construction Co., 235 NLRB 1540, 1541 (1978) (the right to refrain from crossing a picket line is protected, but the employer has the right to replace sympathy strikers for the sole purpose of continuing business operations). Note though that "[c]ommon to all of the decisions in the courts of appeals [on the rights of sympathy strikers] ... [is] a recognition that the remedy of discharging an employee who had refused to cross a stranger picket line might be justified where strong, legitimate business interests were present, where the employee's § 7 interest in not crossing the picket line could not be accommodated without impairing those employer interests, and where it was clear that the decision was not motivated by anti-union animus." Business Services by Manpower, Inc. v. NLRB, 784 F.2d 442, 451 (2d Cir. 1986).

It is hardly unprecedented to find that conduct with a protected object may nonetheless be unprotected because of the means employed. An Administrative Law Judge ruled, in a decision adopted by the Board, that employees who left work early to attend a union meeting did not engage in a "strike, withholding of work, or other permissible form of protest," even though "[t]here is no question that attending a union meeting is protected activity under the Act."[41] Similarly, partial or intermittent strikes,[42] sit-down strikes,[43] and work slowdowns[44] are unprotected regardless of the employees' objectives. As the Board long ago held, "the inherent character of the method used sets th[ese] strike[s] apart from the concept of protected union activity envisaged by the Act."[45]

Moreover, the right to strike "is not absolute"[46] or "without limitation."[47] The Board has refused protection to striking employees who "fail[] to take reasonable precautions to protect the employer's operations from such imminent damage as foreseeably would result from their

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[41] Quantum Electric, Inc., 341 NLRB 1270, 1279 (2004) (employer lawfully disciplined employees who left work without permission to attend union meeting). See also Specialized Distribution Management, 318 NLRB 158, 160 (1995) (same); Crown Coach Corp., 155 NLRB 625, 636 (1965) (employer lawfully terminated employees who did not show for work in order to attend union meeting).

[42] See, e.g., Embossing Printers, 268 NLRB 710, 722-723 (1984), enfd. mem. 742 F.2d 1456 (6th Cir. 1984) ("[t]hough the objective was lawful, the method was not protected").

[43] See, e.g., Peck, Inc., 226 NLRB 1174, n.1, 1179 (1976) (sit-down strike in protest of employer's refusal to excuse workers early during storm).

[44] See, e.g., Philips Industries, 295 NLRB 717, 732 (1989) (slowdown on production line in protest of change in production standards).

[45] Pacific Telephone and Telegraph Co., 107 NLRB 1547, 1549-1550 (1954) (footnote omitted).

[46] Bethany Medical Center, 328 NLRB 1094, 1094 (1999).

[47] International Protective Services, 339 NLRB 701, 702 (2003).

sudden cessation of work."[48] For example, security guards who walked off work at federal buildings without notice, at a time of "heightened vulnerability" on the anniversary of the Oklahoma City bombings, forfeited protection under the Act.[49] In contrast, security guards for public housing sites who gave adequate notice of their walkout, so that all their posts were covered by substitutes within twenty minutes and no harm resulted, were unlawfully discharged.[50]

We can distill the following principles from these lines of Board authority:

- 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;

- 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 related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules.

## III. Instructions for Processing Charges Involving Political Advocacy

In processing charges involving the question of whether political advocacy is protected under Section 7, the Regions should first determine the purpose and subject matter of the advocacy. With respect to advocacy directed to legislators, the Region should investigate whether there is a specific legislative proposal or enacted provision at issue or whether the advocacy is more diffuse in its scope.

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[48] Id. at 702, citing Bethany Medical Center, 328 NLRB at 1094 (walkout by catheterization laboratory employees protected because there were no emergency patients requiring immediate treatment or other risk of harm to patients).

[49] International Protective Services 339 NLRB at 703.

[50] Federal Security, Inc., 318 NLRB 413, 421 (1995), enf. denied 154 F.3d 751 (7th Cir. 1998).

With respect to complaints or testimony to administrative and regulatory agencies, the Region should determine the subject matter of those appeals and the specific employee concerns underlying those appeals. In the case of political campaigning, the Region should determine if the advocacy relates to specific issues or more generally to the election of a particular candidate or slate of candidates.

After determining the subject matter of the advocacy, the Region should investigate any asserted nexus between that subject matter and a specific employment-related interest, working condition, or ongoing labor-management dispute. Advocacy that is more diffuse in scope tends to be more attenuated from employment-related concerns.

The Region should then investigate the means employed. Political activity related to employment concerns that occurs during nonwork time and in nonwork areas is generally protected. On the other hand, on-duty political advocacy is subject to restrictions imposed by lawful, neutrally-applied work rules. As in any case, the Region should also investigate whether any discipline imposed was consistent with or a departure from a neutral, nondiscriminatory policy and the employer's past practice.

Because we are newly announcing an enforcement policy that seeks to clarify an area in which the legal rights of the parties were heretofore unclear, the Region should submit such cases to the Division of Advice using the framework set forth in this Memorandum, supporting its conclusion as to whether or not complaint should issue.

/s/
R.M.

cc: NLRBU
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