



Labor Board Instructs Employers That Non-Work Political Activity Isn't Protected By Federal Law

Insights

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As the Nation's political season continues to intensify, the NLRB has issued a timely advice memo highlighting the test for determining when political activity is protected under federal labor law. In a recently issued advice memo released on September 14, the Division of Advice concluded that political activity with no "nexus to a specifically identified employment concern" was not protected by Section 7 of the National Labor Relations Act. What do employers need to know about this development, especially in light of today's tumultuous political climate?

Summary Of Charge And Advice Memo

Consistent with a 2008 General Counsel memo for charges involving political activity, a dispute involving just such an issue was recently submitted to the NLRB's Division of Advice for review. The charge alleged that an employee was terminated for working on "police transparency and accountability legislation" in the employee's capacity as a state legislator.

At the outset, the NLRB recognized that Section 7 generally protects conduct "in support of employees of employers other than their own" or to "improve their lot as employees through channels outside the immediate employee-employer relationship." The agency went on to note that activity before a political body, such as a state legislature or local municipal council, is protected "if it relates in some demonstrable way to employee concerns over wages, hours or working conditions." _

Likewise, the Division of Advice referred to caselaw protecting political advocacy when there is "a nexus between what is being advocated and employee terms and conditions of employment." In some cases, as the NLRB further noted, the question of whether political activity is protected may be a matter of degree. As the U.S. Supreme Court has held, political advocacy may no longer be protected when the connection between it and employment interests "becomes so attenuated that the political advocacy cannot fairly be deemed to come within the protection of Section 7." _

In the matter before it, however, the Division of Advice concluded that the employee advocated for policy reform within the limited capacity of a state delegate testifying before a local council, and as such it had nothing to do with their employment or that of anyone else. Rather, the political advocacy was done solely in the interest of the community at large and in furtherance of their own political agenda. Because there was no nexus between political activity and any articulated employment concern, the NLRB recommended dismissal of the charge.

Employer Takeaways

Notwithstanding the NLRB's recommendations in this particular case, you should take note of the considerations for extending protection to workplace political activity as the general elections draw near. A 2008 Memorandum from the NLRB's Office of the General Counsel highlights the following general principles:

- Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern that takes place during the employee's own time and in non-work areas is **generally protected**;
- On-duty political activity for or against a specific issue related to a specifically identified employment concern is **subject to applicable restrictions** imposed by lawful and neutrally applied work rules; and
- Leaving or stopping work to engage in political advocacy for or against a particular issue related to a specifically identified employment concern may also be **subject to restrictions** imposed by lawful and neutrally applied work rules.

This guidance remains applicable within today's politically charged workplace environment. As the political season continues to intensify, the [Fisher Phillips Labor Relations Practice Group](#) will continue to monitor NLRB developments related to political activity and the workplace. We will continue to provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information.

Fisher Phillips has a number of resources to aid employers with addressing the unprecedented workplace tension expected to arise this election season. The article "[How To Handle Unprecedented Workplace Tension This Election Season: A 10-Step Action Plan](#)" covers some common misconceptions and provides legal standards employers should keep in mind. It also includes a 10-point action plan to implement now to proactively avoid problems and respond to them if they arise. Our firm's wholly owned subsidiary, Foundations Human Resources Consulting, has designed an interactive training session, [Managing 2020 Workplace Tensions Interactive Training](#), crafted to meet the unique challenges we are facing at the current time.

Should you have any questions on how these principles may apply to your workplace, we would encourage you to contact your Fisher Phillips attorney or a member of our [Labor Relations Practice Group](#).

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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