

## **Political Activity in the Workplace: Considerations for Employers**

**September 10, 2008**

Now that the Democratic and Republican conventions have concluded and the November 4 presidential election is quickly approaching, employers can expect to see a spike in political activities by their employees. This is especially likely with the potential passage of two major pieces of legislation—the Employee Free Choice Act (EFCA) and the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (known as the RESPECT Act)—hanging in the balance. Both bills will become a priority in Congress if the Democratic party is successful in capturing the White House and retaining majorities in both congressional houses.

In this politically charged environment, it is particularly important that employers are aware of federal laws that (1) impact an employer’s ability to prohibit or restrict employees from engaging in political activities, and (2) limit the types of political activities an employer may engage in with respect to its employees during the federal election process.

### **Treatment of Political Activities of Employees Under the National Labor Relations Act**

Section 7 of the National Labor Relations Act (NLRA or Act) provides employees with a statutory right to engage in concerted activity for “mutual aid or protection.” 29 U.S.C. § 157. This language has been found to protect employees when they seek to “improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex v. NLRB*, 437 U.S. 556, 565 (1978). Whether employee political activity or advocacy is protected under the “mutual aid or protection” language of Section 7 of the NLRA depends on whether the advocacy relates to a specific employment-related concern and the specific means utilized to express such advocacy.

On July 22, General Counsel for the National Labor Relations Board (NLRB) Ronald Meisburg issued a memorandum to all of the NLRB’s regional offices that serves as a guideline on how the General Counsel and NLRB regions will handle unfair labor practice charges involving political advocacy. *See Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, GC Memo 08-10 (July 22, 2008). (This memorandum can be found online at [http://www.nlr.gov/shared\\_files/GC%20Memo/2008/GC%2008-10%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-10%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf).) The General Counsel explained that in determining whether employee political advocacy is protected under the NLRA, the regions will look to see if there is a specifically identified employment concern that the employee is advocating. Political activity that is attenuated from employee problems or concerns will generally not be protected under the NLRA. Conversely, activity that links

support for a particular candidate or political party and a specific employment-related concern (e.g., passage of the Employee Free Choice Act or the RESPECT Act) will be considered protected.

The General Counsel also provided a guideline on how certain types of employee political activity or advocacy will be treated by the General Counsel and the NLRB regional offices:

1. Nondisruptive political advocacy related to a specifically identified employment concern that takes place during the employees' own time and in nonwork areas will be considered protected under the Act.
2. On-duty political advocacy related to a specifically identified employment concern may be subject to restrictions imposed through lawful and neutrally applied work rules.
3. Leaving or stopping work to engage in political advocacy that is related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally applied work rules.

Based on the guidelines set forth in the General Counsel's memorandum, employers should keep the following guidelines in mind:

- Purely political activity or advocacy is not protected activity and, thus, may be prohibited by lawful and neutrally applied work rules. This would include the wearing of campaign buttons or T-shirts that solely advocate for a particular candidate (e.g., "Vote for Obama" or "Vote for McCain").
- Political activity or advocacy that is linked to a specific labor- or employment-related concern will be protected. This would include the wearing of a campaign button or T-shirt that advocates for a particular candidate and ties that candidate to a specific, identifiable employment-related concern (e.g., "Vote for Obama, He's Pro-EFCA" or "Vote for McCain, He Will Help Immigrants Gain Employment"). Activity that occurs while an employee is on duty may be restricted by a lawful, neutrally applied policy, such as a dress code for employees who are in direct contact with customers.
- Absent special circumstances, campaign buttons or T-shirts that contain a union's name or insignia cannot be prohibited by neutrally applied policy. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945); *Quantum Electric, Inc.*, 341 NLRB 1270, 1280 (2004). "Special circumstances" may exist where an employer shows that a prohibition against the wearing of union insignia is necessary for production and safety considerations, or to sustain a rationally important professional image or appearance.
- Leaving work to attend a campaign rally or event that relates to a specific, identifiable employment-related concern will be considered protected activity. Such activity may be restricted by a lawful, neutrally applied work policy.

### **Restrictions Under Federal Election Laws on Political Activities by Employers**

Employers should also be aware of federal election laws that restrict the types of political activities an employer may engage in with respect to its employees. On August 8, 2008, several labor groups filed a complaint with the Federal Election Commission (FEC) alleging that an employer violated federal

election laws by discouraging employees from voting for Senator Barack Obama because his election would lead to the enactment of the Employer Free Choice Act.

Under the Federal Election Campaign Act (FECA), an employer is allowed to make communications on any subject, including communications containing express advocacy of a particular candidate or political party, but only to its “restricted class.” 2 U.S.C. § 441(b)(a) and (b)(2)(A); 11 C.F.R. § 114.3(a). The FEC defines an employer’s “restricted class” as its stockholders and executive or administrative personnel and their families. 11 C.F.R. § 114.1(j). “Executive or administrative personnel” includes salaried individuals who have “policymaking, managerial, professional, or supervisory responsibilities,” but excludes salaried foremen and salaried lower-level supervisors who directly supervise hourly employees. *Id.* § 114.1(c)(1)(2). Therefore, should an employer wish to express support for or against a particular candidate, it must limit its communications to those individuals that fall under its “restricted class.” A violation of this provision may result in the issuance of a civil monetary penalty.

Employers do not have to permit employees to use their facilities for political activities. However, if an employer does allow employees to use its facilities, it must be limited to “occasional, isolated, or incidental” use for “individual volunteer activity.” *Id.* § 114.9(a)(1). The FEC defines “occasional, isolated, or incidental use” generally as “an amount of activity which does not prevent the employee from completing the normal amount of work which that employee usually carries out during such work period.” *Id.* § 114.9(a)(1)(i). An employer cannot condition use of its facilities on support for or against any particular candidate or political party. *Id.* § 114.9(a)(1). Employees who use an employer’s facilities for this purpose must reimburse the employer to the extent that the employer’s overhead or operating costs are increased. *Id.* Further, if an employer customarily makes its meeting rooms available to outside groups, it may provide meeting space to a political committee or candidate so long as the same opportunity is made available to any political committee or candidate on the same terms. *Id.* § 114.13.

Federal election laws place other restrictions on political activities of employers, including an employer’s ability to make financial contributions to or sponsor events for a particular candidate or political party. Employers should review all federal election laws to ensure that they are in compliance before undertaking political activity in the workplace.

Further, federal election laws prohibit federal contractors from making any contribution or expenditure of money or “other thing of value” to any political candidate or party for federal office. 11 CFR § 115.2(a). While this prohibition does not apply to state and local elections, federal contractors should also review all applicable state and local laws to ensure that they are in compliance before engaging in any political activity.

## **Conclusion**

Employers should review their employment policies and work rules concerning political activities to ensure that they comply with federal labor and election laws. All policies should be enforced consistently. Moreover, given the potential distinctions and nuances as to whether employee political activity or advocacy will be protected by the NLRA, any decisions to discipline an employee for politically related activity should be reviewed carefully before the discipline is imposed.

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