

## EMPLOYERS AND LAWYERS, WORKING TOGETHER

# The Practical **NLRB** Advisor

## The 'resistance' comes to work

### In this Issue

- 2** Brian in brief
- 8** What the general counsel says
- 10** What the NLRB says
- 12** A 'delay' in filling Board vacancies?
- 13** Other NLRB developments

*Mom's Home Cookin' prides itself on the strong relationship it has built with its employees over more than 25 years in business. The bustling restaurant has grown from a humble beginning, with just two employees, to a thriving business with more than 30 servers, kitchen staff, and bus staff. And, while the composition of the workforce has changed a bit, the family atmosphere remains. Even when conversations grew heated during the 2016 election season, "Mom" liked to say it was just like a contentious Thanksgiving dinner with relatives of different political stripes.*

*When the fast-food restaurant across the street was targeted by protesters demanding that the chain pay its workers \$15 per hour, Mom's employees showed little interest. So Mom was surprised when, one day in February, all three of her dishwashers announced they would not be coming to work the next day. Instead, they told her, they were going to take part in the "A Day Without Immigrants" protest. Mom knew they were upset about the new president's immigration policies, but she pointed out that since they were all lawful U.S. residents they had no reason for concern. Moreover, she had no contingency plan for their absences. Mom pleaded with Marco, her seasoned employee, whom she suspected was the ringleader. He was sorry to put her in a jam, he said, but he was adamant. So, too, was Mom. "If you don't show up tomorrow," she finally threatened, "don't bother showing up ever again."*

**RESISTANCE** continued on page 3

## BRIAN IN BRIEF



Critics of organized labor often charge that in recent years labor unions and their leadership appear far more interested in “political” advocacy, loosely defined, than in traditional collective bargaining. Conversely, defenders of the movement argue that, in many instances, political activism is a more effective way of securing worker gains than individual

employer-based negotiations. Whatever the merits of the respective arguments, the increasing involvement of organized labor in the political sphere is an indisputable fact.

This politicization of the union movement raises interesting issues. For example, what happens when a union’s political advocacy is at odds with the political views of its own rank and file? This issue clearly played a role in last year’s presidential elections where the Republican candidate garnered a historically high level of support from “union households.”

The blurring of the line between “labor” or “workplace” issues and political or policy matters is not, however, the exclusive province of political strategists. In an era of increasing, and increasingly public, political activism the phenomenon has created a number of issues and unique practical problems for employers as well. In this issue of the *Practical NLRB Advisor*, we take a closer look at one of those problems: the “political” protest over work-

related issues. Protest activities like the Women’s March on Washington, the “Fight for 15” demonstrations, and the “A Day Without Immigrants” protests, all of which possess, in whole or in part, a nexus to the workplace and/or workplace issues, are becoming more commonplace. The fact that such activity may arguably be related to an employee’s workplace often raises complex questions under the National Labor Relations Act (NLRA)—questions that are compounded whenever an individual chooses to participate in such activity and his or her employer either wants or feels compelled to respond to the workplace impact of such participation.

Where is the line between a “political” and “labor” protest? What range of activities did Congress intend to protect when it enacted the NLRA? What right does an employer have to enforce normal absence and behavior rules in the face of these kinds of protests? This issue of the *Advisor* attempts to shed some light on these and a number of related questions, all of which have increasing resonance as the incidence of the “political” protest is on the rise.

Sincerely,

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### About Ogletree Deakins’ *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins’ *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm’s veteran traditional labor attorneys will update you on the critical issues in NLRB practice, with practical, “how to” advice and an insider’s perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions’ *Employment Law Daily*.

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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**RESISTANCE** continued from page 1

*The next day, all three dishwashers failed to come to work. Their absence was disruptive, but the restaurant managed to get through the busy lunch period with other staff pitching in at the sink. Nonetheless, the following day, when Marco came in for his early shift, Mom fired him on the spot. It pained her to do so, but she had warned him, and she was hurt that her long-term employee would put her in such a bind. The other dishwashers would keep their jobs, despite their absences, since she was sure Marco had put them up to it. Besides, she needed them! But when the pair arrived for the lunch shift and learned that Marco had been discharged, they angrily walked out in protest—prompting Mom to fire them as well.*

Conceived by anti-administration activists, and fueled by social media, the recent A Day Without Immigrants protest grew into a general nationwide strike challenging the president's call for stricter immigration enforcement and his executive order imposing travel restrictions on citizens of several Muslim-majority countries. According to event organizers, the civil disobedience and demonstration was intended to “show Donald Trump . . . that our voices will be heard” and to demonstrate the economic power of the nation's immigrants by withholding their labor for a day. As a consequence, many businesses suffered losses, as thousands of employees attended political rallies or simply stayed home from work.

A Day Without Immigrants was one of several protests in the wake of the new president's inauguration and nascent administration. For example, the Women's March on Washington took place the following month, and activists have promised more large-scale protests through the spring and into the summer. This general political “resistance” activity has coincided with the growing recent phenomenon of labor-related picketing and work actions aimed at specific employers or industries. Carefully orchestrated “Fight for 15” actions, carried out by “alt-labor” groups with clear ties to organized labor, have involved staged protests and “intermittent” strikes seeking to compel big-box retailers and fast-food franchises to pay workers more than double the current federal minimum wage rate. While the Fight for 15 activities are designed to look like spontaneous employee protests, and while some employees of the targeted company often participate, they are, for the most part, populated by paid organizers as

part of a long-game labor organizing strategy. Regardless of their origin or motive, however, these targeted protests can threaten a company's reputation, its operations, and its employee relations.

Dealing with such protest activity and any associated absences from work often involve complicated legal issues, and an employer's response often involves both legal and practical risks.

## The issues

When the “resistance” comes to work, a host of questions face most employers:

- Do employees have a legal right to protest or support a political cause at work?
- Do employees have a legally protected right to skip work altogether in order to protest or support a political cause?
- Under what circumstances can an employer discipline employees for activity in support of a political or policy cause?
- Should an employer discipline employees for this type of activity?

Like most legal questions, the answers here are fact-specific, and often turn on the form or method of the protest activity, the nature of the underlying issue that sparked discord, the status of the protesters under the National Labor Relations Act (NLRA), the time and location of the activity, and the employer's own labor relations policies and practices.

**The NLRA.** Section 7 of the NLRA gives employees the right to engage in “concerted activities” for the purpose of their “mutual aid or protection.” This right applies to *all* statutory employees whether they are represented by a union or not. Section 8 of the NLRA makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of those Section 7 rights.

In analyzing the respective rights of employers and employees in any arguable instance of protected concerted activity, including political protest activity, one generally must determine:

- 1) Is the *subject* of the activity something which the NLRA is intended to cover?
- 2) If so, is the *means* utilized to address the subject protected, or does it exceed the protections of the Act?

**Is this really a “labor” issue?** The first question posed above essentially analyzes whether the subject of the activity falls within Section 7’s “mutual aid or protection” language. In a 1978 case entitled *Eastex, Inc. v. National Labor Relations Board*, the Supreme Court of the United States held that the “mutual aid” language of the statute must be liberally construed and that it encompasses even advocacy aimed beyond workers’ immediate employers, including political advocacy, if such efforts have an “immediate relationship” to the employees as employees.

In *Eastex*, employees, during their nonwork time and in nonwork areas of the employer’s premises, sought to distribute literature regarding, in part, minimum wage legislation and the state’s right-to-work law. The employer prohibited the distribution contending that the subject of the flyer did not fall within the ambit of Section 7’s “mutual aid or protection” clause, essentially because the employer had no control over how elected officials dealt with either the minimum wage legislation or the right-to-work law.

The Supreme Court, however, held that the employees’ political activity was covered by the “mutual aid or protection” clause, noting that when employees “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including “resort to administrative and judicial forums, and . . . appeals to legislators to protect their interests as employees,” such activities “are within the scope of this clause.” The Court did find that the coverage of the mutual aid clause was not without limitation, observing that when the relationship between the political activism and employees’ interests become too “attenuated,” these activities no longer fall within the “mutual aid or protection” rubric.

**Is this conduct that is protected?** Assuming the *subject* of employee activity falls within the mutual aid clause, the second question posed above analyzes whether the *means* utilized by employees to further their aims warrants or exceeds the protections of the NLRA. Thus, even where the *subject* involves matters with an unquestionable nexus to an employee’s specific workplace, the *means* that employees utilize may nonetheless remove it from the protection of the Act. In the most obvious examples, while employees may seek an increase in their wages or an improvement in their working conditions, the

Act does not protect them if they make a concerted threat to do physical harm to the owner of the business in order to achieve those aims. In such circumstances, while the *subject* of their action is within the ambit of the Act, the *means* they have chosen to achieve it causes them to lose the protection of the Act.

Because the *means* used by employees in *Eastex*, i.e., the nondisruptive distribution of literature on nonwork time, was clearly protected, the decision does not directly address the question of when, or under what circumstances “political” activity, although within the mutual aid clause, may nonetheless be unprotected in light of the means employed to address it. Although not reaching the issue, the Court did, however, foreshadow the analysis. In *Eastex*, the Court specifically rejected the argument that simply because an employer has no control over the disposition of a work-related issue like minimum wage or right-to-work legislation that activity with respect to such issues falls outside the mutual aid clause. However, the Court went on to note that although the *subject* is within the clause, the *means* used to address it, *specifically the use of economic pressure*, may be unprotected where the employer has no control over the disposition of the issue.

## The 2006 protests

Protests over immigration policy are not a new phenomenon. In 2006, there were a number of A Day Without Immigrants protests in opposition to certain immigration policies and proposals by the Bush administration. In a series of advice memoranda, and eventually in a 2008 General Counsel (GC) memo (discussed in detail in “What the general counsel says” on page 8) the National Labor Relations Board (NLRB) set out the analytical framework for resolving charges where employees were disciplined for absenting themselves from work to attend the subject protest activities. Given the Supreme Court’s view of the breadth of the mutual aid clause, all the memoranda assume that the *subject* of the protest fell within the clause. However, they then point out that simply because the *subject* falls within Section 7 does not mean that the *means* will be protected. For example, the memos all cite the case of the employee who walks off the job, in contravention of an employer’s work rules, to attend a union meeting. Attending a union meeting is clearly Section 7 activity, but doing so under the described circumstances is simply not protected. Consequently, disciplining the employee for an unauthorized absence does not violate the Act.

This *unprotected means* analysis, however, involves one additional complexity. Walking off the job or withholding one's labor through absence from the workplace is precisely what employees do when they engage in a strike. Striking is typically protected activity. Indeed, Section 13 of the NLRA specifically reinforces that notion. So why, when an employee absents him or herself from work with regard to a subject within the scope of Section 7, is he or she not a striker who may not be lawfully disciplined for his or her strike activity? Without casting the question in such stark terms, the GC's memo first notes that not all strikes are protected. For example, "sit down" strikes or "intermittent" strikes have been traditionally found to be unprotected because of their means. However, the memo goes on to posit that where the subject that occasions the absence is not a matter over which the employer exercises control, the absence is not a "strike" that is protected by the Act. This position mirrors the language in *Eastex* to the effect that while an employer's inability to control the underlying issue, e.g., right-to-work legislation, does not remove the *subject* from Section 7 coverage, it may render economic pressure in furtherance of that subject, i.e., a strike, unprotected.

## Unpacking the current law and applying the standard

Under the NLRB's current view of the law it is clear that the determination of whether or not a political issue is sufficiently connected to the workplace such that it is encompassed under Section 7's "mutual aid or protection" clause is one subject to a liberal construction. It is equally clear that nondisruptive political advocacy for or against a specific political issue affecting specific employment concerns that occurs during the employee's own time and in nonwork areas is protected. These are both fairly clear in the Supreme Court's *Eastex* decision, which is binding on the agency. What is arguably less clear and more susceptible to change or varying interpretation is what happens when the political advocacy results in an employee absenting him or herself from work. Under these circumstances, leaving or stopping work to engage in such political advocacy *may be*, but is not necessarily protected, and an employee taking this course of action *may be* subject to discipline pursuant to an employer's lawful work rules.

Pursuant to the GC's 2008 memo, the protected/unprotected question often turns on whether the employee's absence—and resulting economic pressure on his or her

employer—is related to an issue over which the employer has control. If the employer does not have any control over the outcome of the dispute, the employee action is not protected, and employees engaging in such a "strike" are subject to discipline. Even if the absence is deemed to be a protected strike, it can arguably lose such protection if the strike activity is otherwise unprotected, for example, where employees engage in an intermittent strike. While these are both part and parcel of the currently expressed agency view, the theories themselves are not cast in stone, but more importantly are susceptible of differing outcomes when applied to specific facts. Suppose an employee announces his or her intention to be absent from work to participate in the Women's March, stating it is in support of the march's political goals *and* in an effort to pressure the employer to voluntarily provide extensive paid parental leave. The bright-line distinction in the GC's memo would seem to evaporate here where the employee has dual concerns, one of which the employer cannot control, but the other of which it can.

The difficulty in applying the theories can be readily seen in the Mom's example above. Since the immigration policies at issue in the example had no impact on Marco and his colleagues who were already legally in the United States and legally entitled to work, it is likely that the protest had no nexus to the workplace and thus had no Section 7 coverage in the first place. However, given the broad view of the "mutual aid or protection" clause, it is possible to reach the opposite result. Even if Marco and his colleagues were found to have a Section 7 interest in national immigration policy, their absence from work would still lack protection under the GC's memo because Mom herself plainly has no control over the Trump administration's policies. On the other hand, Mom did have direct control over the decision to fire Marco, and his discharge directly impacted the workplace. Therefore, when his coworkers engaged in their second walkout to protest Marco's discharge they were not only engaged in concerted activity for their mutual aid or protection, their activity was protected because Mom had control over both the decision to fire Marco and the ability to change the decision.

In the real world, the no-employer-control/no-protected-strike formulation contained in the GC's memo can become dicey to apply if for no other reason than the employee, him or herself, can articulate a self-serving motive for his absence that may bring it within the realm of an issue the employer *can* control.

## Lawful and neutrally applied rules

The real-world complexities of determining whether conduct is protected and discipline is lawful do not end with the analysis above. It is also important to bear in mind that where the political activity is deemed to be sufficiently connected to the workplace to fall within Section 7's mutual aid clause, any permissible restrictions, and ensuing discipline, based on that activity must be facially lawful and uniformly applied. In the case of the 2006 A Day Without Immigrants protests, if as the GC assumed, attendance was protected activity, even if the *means* rendered it to be otherwise unprotected, that does not mean the employees can be disciplined for their absence with impunity. The rules regarding *discriminatory or disparate* treatment of protected activity still apply. Thus, if an employer let employees skip work to celebrate an important victory by a hometown athletic team, but later disciplined employees for participating in an otherwise protected A Day Without Immigrants protest, such disparate treatment would still be legally problematic. One can also add to this equation potential disciplinary discrimination claims that are unrelated to the NLRA. For example, if an employer were to allow employees to leave work without discipline to participate in the Women's March, but deny permission or discipline employees who left to attend the A Day Without Immigrants protest, the potential for a national origin discrimination claim does not require much imagination.

**The big picture.** Evaluating whether or not to discipline or restrict employees who engage or seek to engage in political protest activity is not an easy task. It requires legal analysis that is multi-faceted, invariably fact-specific, and rife with "fluid" theories. There are clearly instances in which maintaining order and efficiency, as well as disciplinary consistency, will require an employer to take action even though it may entail some degree of legal risk. In such cases, the complexity of the analysis cannot get in the way of the need for action. There are, however, also many more instances where the decision involves a degree of discretion. In those cases, it usually behooves a prudent employer to step back and assess the situation objectively and unemotionally even when the employer concludes the law is on its side.

Consider for a moment the net result for Mom in light of her actions. She wound up losing her most senior and reliable dishwasher who may or may not have a valid claim against her for reinstatement and back pay. She also lost her other two dishwashers both of whom almost surely have valid

claims against her for reinstatement and back pay. Ironically, she set down her decisional path because she didn't want the inconvenience of not having her dishwashing personnel absent for part of a day. Most importantly, however, she may well have done permanent damage to her overall relationship with all of her employees. Such a relationship is invaluable. As in the hypothetical, it typically takes years to build, but only one rash decision to destroy.

C. Thomas Davis, Co-Chair of Ogletree Deakins' Traditional Labor Relations Practice Group, points out that, particularly in these kinds of "political" situations, "the right question for an employer to ask is usually not 'Can I do it?,' but 'Should I do it?'" These are decisions where you can be "dead right on the legal analysis and dead wrong on the practical consequence." Firing or disciplining employees who participate in "political" or policy protests, particularly high-profile ones, not only can result in decidedly negative internal personnel consequence, but equally negative external consequence. "Almost any political issue these days seems to have an almost equal number of supporters and opponents," Davis notes. "That simple math means that any decision to fire an employee for 'political' participation is guaranteed to anger or alienate, at least theoretically, half of your customer base. This is a serious dilemma for customer-facing businesses, but applies to other businesses as well."

## Proactive measures

While, as noted, legally different than a traditional strike a political protest walkout can have the same consequences. As H. Ellis Fisher, a Shareholder in Ogletree Deakins' Greenville, South Carolina office notes: "No prudent employer would go into contract negotiations without having planned for the contingency of a strike. Similarly, no employer that might be susceptible to a political walkout should fail to develop some plan to address that contingency as well."

If, in the opening scenario, Mom had thought through the issue ahead of time, she might have saved herself a lot of trouble. Like many employers, however, she didn't think it could happen at her restaurant, and so she didn't give any thought to how she might have avoided the problem. With the increasing incidence of protest actions, however, employers should consider developing some type of an advance plan. A "strike" contingency plan that addresses the myriad considerations—legal, operational, reputational—can help to facilitate an appropriate response.

Proactive employers can get in front of potential political activism-related absences before they arise. In the lead-up to a scheduled large-scale protest, remind employees, through regular employee communication channels, of the relevant policies and handbook provisions, and inform them, where appropriate, that the normal rules apply. Such a reminder may serve as a deterrent in the case of unprotected conduct; however, it must be carefully composed to avoid any claim of interference with employees' NLRA-protected conduct.

Emphasize what is at stake for the company—that protest-related absences have an adverse effect on productivity, coworkers, customers, and the bottom line. However, also acknowledge that you understand the concerns of would-be protesters, and reaffirm the company's own positive record with respect to the issue at hand. For example, depending on the political cause, remind employees that a significant portion of your workforce is comprised of immigrants, that women hold senior leadership roles, that diversity and nondiscrimination are core company values, or that the company provides generous paid family leave. Convey the important message that the company is not the enemy. Also, remind employees that there are other appropriate ways to show support for the cause without going AWOL. Lastly, if the issue is a controversial one, be careful about taking sides and alienating another faction of your workforce. Acknowledge that the issue is controversial and that you respect the rights of all employees to form their own opinions and to express themselves in appropriate ways.

## Parting thoughts

Finally, keep these additional points in mind.

- Any employment-related political activity in which employees participate *outside* of work, on their own time, is generally protected under the NLRA. Employers that

discipline employees for such conduct risk an unfair labor practice violation.

- Consider the wage and hour implications of strike-related absences. Employers are not required to pay nonexempt employees for unexcused absences. Nonexempt employees who take paid time off should be paid in accordance with the employer's standard policy. Exempt employees cannot be docked for their absences under the Fair Labor Standards Act. And, of course, calling in reinforcements for employees whose absences are anticipated may mean that the replacement workers surpass 40 hours that week, triggering an obligation to pay overtime.
- The NLRA only covers "employees," not managers or supervisors. Therefore, employers may discipline managerial or supervisory employees who miss work due to political activity, without concerns of violating the Act. One caveat, however: Discharging a popular supervisor can have an adverse effect on his or her subordinates, and their concerted response to such action *would* be protected. (Mom in our scenario suffered a similar fate.) Therefore, employers must consider the wisdom of doing so, as an employee relations matter.
- Other federal, state, or local laws may also restrict employers' ability to discipline employees for their political activity. A number of states have off-duty conduct protections that bar employers from taking adverse action against employees for their private activities. Also, some states extend First Amendment free speech protections to private-sector employees, affording them the same rights to engage in political speech that public employees enjoy.

NLRB case law and formal guidances issued by the NLRB GC can help employers navigate the thorny legal issues at stake, and are discussed in depth in this issue of the *Practical NLRB Advisor*. ■

## What the general counsel says

### Politics and protected activity

While the recent uptick in political protest may seem to be an entirely new phenomenon, this is not the first occasion in which the nation's employers have had to deal with the prospect of activism-related absenteeism. In fact, widespread A Day Without Immigrants protests in 2006 prompted the National Labor Relations Board's then-General Counsel (GC) Ronald Meisburg, in July 2008, to issue formal guidance advising the agency's regional offices how to handle unfair labor practice charges resulting from employer disciplinary action for thousands of employees who took unscheduled time off from work to participate in the coordinated demonstrations.

*To be within the scope of the clause, there must be a “direct nexus” between the subject of the political action and “the specific issues that are the subject of the advocacy.”*

**Is the subject protected?** The guidance, entitled “Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy” (GC 08-10), explained that employees' protest actions might be protected activity for employees' “mutual aid or protection” pursuant to Section 7 of the National Labor Relations Act (NLRA). To be within the scope of the clause, there must be a “direct nexus” between the subject of the political action and “the specific issues that are the subject of the advocacy.” This Board standard is derived from the seminal 1978 decision of the Supreme Court of the United States in *Eastex, Inc. v. National Labor Relations Board*. When processing unfair labor practice charges arising from such incidents, regional offices are to investigate “whether there is a specific legislative proposal or enacted provision at issue or whether the advocacy is more diffuse in its scope,” Meisburg wrote. “Advocacy that is more diffuse in scope tends to be more attenuated from employment-related concerns.”

As for the 2006 immigration protests, Meisburg found the requisite nexus to employment. The protesters were challenging President Bush's proposed immigration legislation, which would have required additional clearances before employees would be eligible to work in the United States, and called for more onerous employee verification

requirements on the part of employers. Also of concern to the protesters was the fear that heightened employer penalties for employers that hired undocumented workers would simply cause employers to forgo hiring *all* immigrants—including lawful immigrants—to avoid committing even inadvertent violations. As such, the legislation that spurred the protests would have directly impacted the protesters' rights as employees, the GC reasoned, concluding that their participation in the rallies fell within the scope of Section 7's “mutual aid or protection” clause.

**Is the conduct protected?** Once it is determined that the subject matter of the employee protest falls within the ambit of Section 7's “mutual aid or protection” clause, the next crucial question is whether the means employed by employee-protesters is likewise protected. In some instances, this is a straightforward exercise. For example, it is well-settled that advocacy that takes place during nonwork time and in nonwork areas is protected under the Act if the subject matter of the protest falls within the “mutual aid or protection” clause, and the conduct does not disrupt the employer's operations.

Unscheduled absences from work, however, raise a different set of considerations. Thus, it can be argued that typically, when an employee absents himself from work, or withholds his labor, in furtherance of a matter covered by Section 7, he is “striking” and that “strikers,” generally, are not subject to discipline for their strike activity. It is this issue to which Meisburg devotes the remainder of his memo.

He begins by pointing out that, under well-settled principles, even if the subject or objective of employees' concerns may fall within the protection of Section 7, the means chosen to address the subject or objective may result in the loss of that initial protection. Thus, he notes: “It is hardly unprecedented to find that conduct with a protected object may nonetheless be unprotected because of the means employed.” He then specifically references the fact that the Board has long found that “partial or intermittent strikes, sit-down strikes, and work slowdowns are unprotected regardless of the employees' objectives.”

The memo next refers to the Supreme Court's *Eastex* decision, noting that the Court, in addressing the fact that an employer typically does not have control over the potential resolution of most political issues, strongly implied that in such circumstances employees' use of economic pressure, i.e. a strike, may not be protected. Thus, in many instances, even where the subject of the political action is related to terms and conditions of employment, "the immediate employer may lack the ability to address the underlying grievance."

Is an absence from work, or a "strike," over such matters statutorily protected under the Act? No, Meisburg concludes. Such concerted economic activity "is protected only if directed at an employer who has control over the subject matter of the dispute." In this respect, political protests are like secondary boycotts, which are generally prohibited under the NLRA because they exert pressure on an employer that lacks the ability to address the concerns of the protesters. For the same reasons, Meisburg concludes that, "similarly misdirected economic coercion in the context of political advocacy may not be protected under Section 7."

Tracing Board case law on the issue, Meisburg sets forth a few principles that remain instructive for employers:

- Nondisruptive 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.
- 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.

"[A]s 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," Meisburg was careful to note. 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."

## Intermittent strikes revisited?

In his memo Meisburg cites "intermittent strikes" as a longstanding example of activity that, because of the means utilized, loses the protection of the Act regardless of its objective. His observation was unquestionably correct in 2008. However, since then, enter the Obama administration, and a decidedly more activist National Labor Relations Board (NLRB). The notion of what constitutes an "intermittent" strike, and whether or not serial work stoppages are protected, has become a much more debatable matter under the prosecutorial leadership of current NLRB GC Richard F. Griffin, Jr. His narrower view of what constitutes an unprotected "intermittent" strike is of particular significance with the rise of disruptive, publicity-seeking strike actions against big-box retailers and other large employers that have been targeted by alt-labor groups. This view may now give legal cover to the Fight for 15-type wave of work stoppages directed at such employers.

**"Ride for Respect."** In one ongoing series of incidents, retail employees would drive together to their employer's company headquarters during a shareholder meeting to protest and to demand higher wages and benefits. This "Ride for Respect" came on the heels of a dozen or so strikes around the country, at a number of the retailer's locations, over the course of a few years. The work stoppages included a coordinated strike action scheduled during a Black Friday that received considerable media attention. Sixteen employees who took unexcused absences to "join the Ride" were subsequently discharged for their participation in what the employers contended were impermissible "hit-and-run," intermittent work stoppages.

However, an administrative law judge **found** that the means the employees chose did not cause them to lose the Act's protection; and, thus, their discharge was unlawful. In his view, the Ride for Respect activities were part of a recurring set of strikes aimed at challenging the employer's policies and working conditions; however, they were not "intermittent" work stoppages. He concluded that the work stoppages in question were materially different from the type of strikes the Board had traditionally identified as "intermittent," and thus unprotected. First, the strike was not part of a strategy to exert additional economic pressure on the company during bargaining negotiations. Moreover, the stoppages were not scheduled in close temporal proximity to one another.

**New tactics.** Noting that employees looking to improve their working conditions are utilizing new tactics like retailer walkouts and the Fight for 15 protests, the GC's office wanted the NLRB to "clarify"—and "modify"—current Board law on intermittent and partial strikes. According to the GC's office, current Board law does not adequately address this emerging form of labor activism, since the existing standard for determining whether "multiple short-term strikes" are protected activity "is difficult to apply to these situations." As a result, employees are left exposed to employer discipline or discharge based on activities that should fall readily within the protective umbrella of NLRA Section 7, the GC asserted in an October 2016 [Operations Memorandum](#) to the NLRB's regional directors and other agency officials. "The rationales the Board has articulated for finding limited strikes unprotected are either unfounded or inapplicable to intermittent strikes. Thus, the Board has unjustifiably narrowed the definition of the protected strike," Griffin wrote.

Since Griffin wanted the Board to take a fresh look at the law the memorandum urged regional offices to be on the lookout for cases that might serve that end. The memo also provided regions with a [model brief](#) to use in cases that involve an intermittent or partial strike.

The framework proposed by the GC would protect multiple strikes—even strikes over the same labor dispute—if:

1. they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns;
2. they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and
3. the employer is made aware of the employees' purpose in striking.

This rubric, according to the GC, "more effectively protects the right to strike, dispenses with the unpersuasive rationales relied on in the past, and better addresses Supreme Court precedent."

The Operations Memorandum says the GC's model brief should inform the regions' analyses of whether a complaint would be warranted under extant Board law and that the brief should be incorporated as an alternative argument in briefs to law judges or the Board. Moreover, if the regions conclude that a complaint is not warranted under current law but *may* be appropriate under the analysis provided in the model brief, the regions are to submit the case to the NLRB's Division of Advice. ■

## What the NLRB says

Over the years the National Labor Relations Board (NLRB) has frequently addressed the relationship between employees' political advocacy and concrete employment-specific concerns in a variety of contexts. These cases illustrate the type of issues with which the Board deals in determining if specific conduct is entitled to the protection of the National Labor Relations Act (NLRA), and also illustrate the general decisional arc of the agency. Here is a sampling:

Employee concern over the impact of an immigration policy on job security is not a new phenomenon. In *Kaiser Engineers* (1974), one of the earliest Board cases involving the protected nature of advocacy outside the employer/employee relationship, members of an engineers' association, concerned that a major industry competitor was seeking to obtain work visas for engineers recruited outside the United States, engaged in a letter-writing campaign to members of Congress appealing "for some protection

from the indiscriminate importation of engineers by large companies." The letter-writing campaign was found to be protected, concerted activity under the NLRA since the engineers' purpose in advocating against the loosening of federal immigration restrictions was to protect job security for themselves and their fellow U.S.-born engineers.

Drawing the line between what is purely political, and what is job-related, is likewise an issue of long standing. In *Ford Motor Co.*, a 1975 case, the Board found that a "mixed content" newsletter that complained about forced overtime and included passing political commentary was protected. The "gratuitous" political remarks did not detract from the intended purpose of seeking better working conditions. However, another newsletter that urged employees not to support the traditional party candidates in an upcoming election and advocating for an independent workers' party was not protected. "This is wholly political propaganda

which does not relate to employees' problems and concerns *qua* employees," the Board said. Arguably, the election of a particular political candidate might ultimately have consequences for employees' working conditions, it conceded, but "material solely concerned with a political election" was too far removed to warrant protection.

**The work vs. politics divide.** The Board's line-drawing exercise has been a frequent one over the years. For example, the Board, in *Firestone Steel Products Co.* (1979), found the employer properly refused to allow the distribution of leaflets in support of candidates for the governorship, senate, and state supreme court. The leaflets were deemed "purely political" and so far removed from the employees' interest as employees that they did not warrant the protections of the Act.

The NLRB's Division of Advice reached a similar conclusion in *Chrysler Corp., Sterling Stamping Plant* (1978) finding an employer permissibly disciplined two employees for refusing to remove a banner that read "Autoworkers Say Down With the System of Wage Slavery. On to May Day." The "political" message was simply too attenuated from any genuine workplace concerns to be protected.

In other instances, however, the Board has found employee political activity falling on the "protected" side of the line. For example, in *Union Carbide Corp.-Nuclear Division* (1981) an employee who circulated a union-prepared "taxpayer's petition" calling on the federal government to investigate the company's "use of our tax dollars for anti-union activities" was engaged in NLRA-protected conduct. Despite its "political overtones," the petition had a "direct impact" on the employees' working conditions—that is, their right to organize in order to improve those working conditions.

Similarly, in *Motorola, Inc.* (1991) employees seeking to distribute materials prepared by an outside group in support of a city-wide ban on mandatory employment drug-testing were involved in protected activity directly related to their working conditions and not in "an unprotected excursion into city council politics." Interestingly, a reviewing appeals court disagreed with the Board in this instance, relying on the fact that the outside group that prepared the materials repeatedly denied that it "represented" the employees, or sought to influence company management.

Most recently, in *Pacific Bell Telephone Co. dba AT&T* (2015), the Board held that employees who wore buttons opposing a state ballot initiative that would have prohibited unions from using payroll-deducted dues and fees for political purposes were engaged in activity protected by the Act. The "No on Prop 32" buttons were not "so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection" of the NLRA's "mutual aid or protection" clause. The Board did concede a ban might be justified if the employer's customers might mistakenly believe that the buttons reflected the company's position on the controversial initiative. However, the Board concluded there was not sufficient evidence to support this contention.

**Legislators and regulators.** Participation in the legislative or regulatory process with respect to even arguably work-related matters has generally received protection from the Board. For example, in *GHR Energy Corp.* (1989) the NLRB found an employer violated the NLRA when it threatened to sue an employee for having testified about environmental safety laws before a U.S. Senate committee and a state environmental agency. The laws at issue directly impacted the working conditions of employees who handle toxic materials.

Similarly, in *Frances House, Inc.* (1996) a union-authored letter to state health department officials detailing an employer's allegedly negligent training, inappropriate work assignments, and falsified documentation at a residential care facility for the developmentally disabled was NLRA-protected because it was related to the facility employees' own concerns about their conditions of employment.

Even regulatory appeals with a general pro-union aim have been found protected when connected to workplace goals. For example, in *Petrochem Insulation, Inc.* (1999) a number of construction unions were deemed to be engaged in protected activity when they filed environmental objections to zoning and construction permits sought by nonunion developers and contractors. The unions claimed that they intervened in the regulatory proceedings to compel the competing companies to provide "a living wage, including health and other benefits," so they would no longer enjoy an unfair competitive advantage, at the expense of union members' job prospects.

Likewise, in *Riverboat Services of Indiana, Inc.* (2005) licensed assistant chief engineers on a casino boat who sent a letter to the Coast Guard complaining about the lowering of licensing requirements for engineers and their employer's hiring of lower-paid engineers with limited licenses were acting out of concern for their own safety and future earnings and, therefore, were engaged in protected conduct.

Similarly, in *Tradesmen International, Inc.* (2000) the Board held that a union organizer's testimony to a municipal board asserting that a nonunion contractor was subject to a bonding requirement was protected. The NLRB found a "nexus" between the testimony and union workers' job opportunities because the union's intent was to equalize the playing field between union and nonunion contractors. A reviewing federal court, however, disagreed with the

Board finding there was not a sufficient nexus between the organizer's testimony and any employment-related matters.

Finally, reinforcing the notion that legislative or regulatory activity still requires a discernible relationship to an employee's terms and conditions of employment, the Board, in *Five Star Transportation, Inc.* (2007), found that school bus drivers were protected by the Act when they sent letters to a school superintendent raising concerns that a competing bus company that had just secured the school district's transit contract would be unable to pay them their current wages and benefits. However, letters written by five other drivers focusing on general safety concerns regarding school children were *not* protected because they either disparaged the bus company or did not sufficiently relate to the drivers' employment conditions. ■

## A 'delay' in filling Board vacancies?

Whenever power shifts in Washington D.C., the anticipated changes in policy can never come soon enough for critics of the preceding administration. It is equally true, however, that the anticipated changes rarely happen quickly. Speed is unattainable for a host of reasons ranging from the sheer number of policies a newly ascendant administration must address, to the breadth and complexity of the bureaucratic machinery that must be harnessed to implement any ideological redirection.

These phenomena are often particularly true in the case of labor policy. Labor issues are typically not at the top of any administration's priority list, especially Republican ones. And, the "labor bureaucracy" has become more partisan and, thus, more difficult to rein in.

All of these truisms have been on full display at the NLRB since the November election. Despite the unprecedented level of opposition to the "Obama Board" policies, it still retains a 2-1 majority, while the two Board seats, that constitute the balance of ideological power, remain unfilled. Newly designated NLRB Chairman Philip Miscimarra, the sole Republican Member on the Board, continues to find himself authoring dissenting opinions, and the many problematic decisions of the Obama Board remain untouched.

All this has led some fretful management-side observers to question if the Trump administration may be less aggressive in overturning the Obama Board's excesses than once hoped. In addition to the empty Board seats, some have noted there are other troubling signs including the new administration's very public outreach to organized labor, the naming of a more ideologically centrist Secretary of Labor nominee in the wake of fast-food restaurant chain CEO Andrew Puzder's withdrawal, and the initial, inexplicable designation of Miscimarra as only "acting," rather than permanent Chair. While only time will tell if these signs will prove the pessimists to be prescient, the so-called "delay" in filling the two empty Board seats may not be as distressing when viewed in historical context.

Few administrations in memory have come to power more indebted to organized labor, and more disposed to implementing radical change at the NLRB, than the Obama administration. When President Obama was sworn in on January 20, 2009, unlike the currently two empty Board seats, there were actually *three* empty slots. That number had persisted for over one year as Senate Democrats blocked any effort by the outgoing President Bush to fill the Board vacancies with his nominees in his last year in office. Despite the length of the vacancies, and the Obama administration's compelling interest in filling them, President Obama did not

announce his intended nominees for the first two of the three seats until April 24, 2009; and did not actually send the full slate of Board nominees to the Senate for confirmation until July of that year. Once in the Senate the slate faced considerable Republican opposition largely focused on the inclusion of controversial nominee Craig Becker. That opposition resulted in President Obama recess-appointing Becker and the other Democratic nominee, Mark Gaston Pearce, on March 27, 2010. Thus, the Obama administration did not gain ideological control of the NLRB until more than 14 months after the president's inauguration. Since then the rules of the Senate have been changed twice to eliminate the use of the filibuster on all presidential nominees.

As this issue of the *Advisor* goes to press, the Trump administration has still not announced its Board nominees. However, it still has several weeks to do so before it falls behind the pace of the Obama administration. Moreover, once sent to the Senate, the elimination of the filibuster virtually guarantees a much faster confirmation of Trump's Board nominees.

In the end, concerned observers may be right about the ideological direction of the "Trump Board." However, any "delay" in naming or seating new Board members is, at present, more illusory than real and is, in no way, a likely accurate predictor of things to come. ■

## Other NLRB developments

Here is a brief summary of other noteworthy developments in recent months:

### Supreme Court

Former National Labor Relations Board (NLRB) Acting General Counsel Lafe Solomon became ineligible to function in an "acting" role once he was nominated by President Obama to serve permanently, a divided Supreme Court of the United States has ruled. According to the Court, the Federal Vacancies Reform Act (FVRA) bars an individual who has been nominated to fill any post requiring a presidential appointment and Senate confirmation from performing the duties of that position in an acting capacity. This prohibition applied to Solomon, a career NLRB official who had been tapped by President Obama first to serve in an acting capacity, and then to take the job permanently, but whose nomination languished in the Senate. Rejecting the NLRB's contention that the FVRA's prohibition does not extend to first assistants who are performing in an acting capacity, the majority said the decision here was a straightforward one, based simply on the plain text of the statute, so it paid no heed to the interpretive canon which, according to the NLRB, suggested otherwise (*NLRB v. Southwest General, Inc. dba Southwest Ambulance*, March 21, 2017).

Remaining unclear, however, was where the high court's decision left the Board's unfair labor practice charges, administrative law judge (ALJ) rulings, and other developments from Solomon's tenure. In a footnote, the Court alludes to the ramifications, noting that under FVRA

Section 3348(e)(1), the NLRB General Counsel is exempt from the general rule that "actions taken in violation of the FVRA are void ab initio." The United States Court of Appeals for the D.C. Circuit assumed that Section 3348(e)(1) rendered the actions of an improperly serving acting General Counsel voidable, but not void. Certiorari was not sought on this issue, however, so the Court did not address it.

### Appellate decisions

**No reimbursement for negotiating expenses.** The United States Court of Appeals for the Seventh Circuit held the NLRB erred when it ordered a college to reimburse a union for its negotiating expenses in a dispute over whether the college had to bargain over the effects of its decision to reduce the credit hours for 10 courses and the parties' efforts to negotiate a successor contract (*Columbia College Chicago v. NLRB*, February 2, 2017). The appeals court vacated that portion of an NLRB order requiring the college to compensate the union for its efforts to initiate effects bargaining and in connection with bargaining for the successor contract.

The terms of the parties' existing collective bargaining agreement (CBA) gave the college the right to alter course credits, and it did not indicate separate treatment of effects bargaining and decision bargaining, the appeals court found. Accordingly, the college was under no obligation to bargain with the union over the effects of the credit-hour reductions. Because the Board awarded bargaining expenses to the union based, in part, on the college's behavior during the

effects-bargaining negotiations, the Seventh Circuit vacated the award of bargaining expenses.

**Employees “handcuffed” to union.** The D.C. Circuit would not disturb the NLRB’s finding that a seafood restaurant unlawfully withdrew recognition from a union at a time when it enjoyed the majority support of bargaining unit employees. However, the appeals court refused to enforce the Board’s bargaining order, which barred raising any question concerning the union’s continuing majority status for a reasonable time. On the facts of this case, the appeals court determined that a bargaining order was out of keeping with the purposes of the National Labor Relations Act (NLRA). It rewarded the union for sitting on its hands, punished the employer for acting unwarily but in good faith, and displayed utterly no regard for employee free choice (*Scomas of Sausalito, LLC v. NLRB*, March 7, 2017).

The restaurant recognized the union as the exclusive collective bargaining representative of its restaurant and bar employees. However, the restaurant thereafter withdrew recognition from the union when 29 of the bargaining unit’s 54 employees signed a decertification petition. Unbeknownst to the employer, however, the union had persuaded six employees to revoke their signatures before the NLRB could conduct a decertification election. The remaining employees, apparently believing they were free of the union, withdrew the decertification petition. The Board sided with the union’s charge that the employer unlawfully withdrew recognition, issued a bargaining order, and barred any challenge to the union’s representative status.

The appeals court agreed the employer had unlawfully refused to bargain but found that the affirmative bargaining order was unsupported. The court noted that the Board must undertake a reasoned analysis that explicitly balances bargaining stability with the employees’ right of free choice and that also considers whether alternative remedies are adequate. In its decision, however, the court observed there was no indication why the Board considered a bargaining order was necessary in *this* case. The union had withheld information about its restored majority status, and the employer had acted in good faith on a facially valid decertification petition. The violation was unintentional, not deliberate or calculated, and nothing about the employer’s conduct was “flagrant.” This was not a case in which, absent a bargaining order, the employer would benefit

by its own wrongs. Also, the genesis of the employees’ discontent in this case was not the employer’s conduct but an extended period of neglect by the union. Consequently, the bargaining order did not further the NLRA’s policy of protecting employees’ exercise of full freedom of association and selecting representatives of their own choosing—it handcuffed the employees to the union for no good reason.

**Confidentiality policy violated the NLRA.** The D.C. Circuit upheld a Board finding that an employer’s confidentiality agreement was overbroad and therefore violated the NLRA. However, the appeals court rejected the Board’s separate determination that the employer maintained an unlawful nondisclosure policy regarding investigatory interviews. It held there was insufficient evidence that nondisclosure was categorically requested in *all* HR investigations involving certain categories of alleged misconduct (*Banner Health System v. NLRB*, March 24, 2017).

The confidentiality agreement in question defined “confidential information” to include “[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee,” and provided that employees would be subject to corrective action, up to and including discharge or possible legal action, if they did not keep “this kind of information private and confidential.” The nondisclosure policy was contained in an “interview of complainant” form that the company’s HR consultant used when investigating employee complaints. It included the statement: “I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.” Employees were never given a copy of the form; rather, the HR consultant merely read the directive aloud to employees during investigatory interviews. The consultant used the directive only “[h]alf a dozen” times in 13 months, and did so only “in the more sensitive situations” such as claims of sexual harassment or suspicion of abuse and only in investigations in which she needed to speak to more than one person.

The court upheld the Board’s determination with respect to the confidentiality policy since it expressly covered information about salaries and discipline, and would therefore be reasonably understood to prohibit discussions protected by Section 7. However, the circuit court rejected the Board’s

finding that the nondisclosure rule was unlawful, concluding that the Board had made “unwarranted logical leaps that the evidence cannot fairly support.” The HR consultant’s testimony was “simply too terse and unclear” to sustain a determination that the employer had a policy of categorically requesting nondisclosure of an entire subset of investigations.

## Board rulings

**Technical violation gives union new election.** Because an employer timely served its voter list only on the Regional Director, and not on the other parties directly, a divided NLRB panel set aside a lopsided 91-54 union election loss. The Board majority found that this procedural error was enough to invalidate the results and order a second election *despite the fact that the list had been forwarded to the union by the Regional Director and received by the union within the time specified in the rules.* This was just what the Board’s “quickie” election rule was designed to eliminate, the Board majority reasoned in *URS Federal Services, Inc.*, saying it was trying to abolish this two-step process—under which the employer would file the list with the Regional Director, who would then forward the list to the other parties—because it had caused delay and unnecessary litigation. To the majority, its rules were clear and mandatory; however, Member Miscimarra, dissenting, argued that the Board had only to determine whether a purely technical violation of a service requirement, timely cured by the regional office, warranted overturning election results that overwhelmingly disfavored the union. In his opinion, the majority chose to “lightly set aside” the election instead of following well-established Board law. At best, the majority’s view appears to be one that slavishly elevates form over substance.

**Three days’ notice of election.** Two months later, in *European Imports, Inc.*, Miscimarra dissented from the Board’s denial of an employer’s emergency request for review seeking to reschedule a union election. Arguing that the “election date set by the Regional Director—pursuant to the Election Rule’s mandate—only gave *three days’ notice* to a substantial number of employees that they would be voters in a union-representation election,” Miscimarra emphasized that it “continues to be unreasonable for the Board not to establish *any* concrete parameters regarding a reasonable time frame for conducting representation elections.”

The unfairness associated with this practice was exacerbated in this instance by the Regional Director’s refusal to permit

the employer to create a record regarding problems associated with the election rule’s application, Miscimarra asserted, noting that the employer was entitled to make a record regarding actual prejudice allegedly resulting from the procedures set forth in the rule. By preventing it from introducing this evidence, “the Board and any court of appeals have also been prevented from passing on *any* prejudice or denial of due process caused by the Election Rule’s application here, because substantive rulings by the Board and the court must be based on record evidence—i.e., evidence admitted in an ‘appropriate’ hearing.” Noting that the employer argued the application of the election rule deprived it of due process and unfairly prejudiced it *in this proceeding*, Miscimarra pointed out that this claim was materially different from the issue presented in the small number of Board and court cases that have denied challenges to the facial validity of the rule itself.

**Barring use of employee info violated NLRA.** An employer’s conduct rule restricting the use of personal employee information could reasonably be understood as an attempt to keep employees from discussing their terms and conditions of employment, in violation of the NLRA, the Board ruled in *Cellco Partnership dba Verizon Wireless*. A 2014 version of the rule cautioned employees to take “appropriate steps” to protect all personal employee information and instructed them not to access or disclose other employees’ personal information to anyone inside or outside the company. Employees in certain circumstances have a Section 7 right to *obtain* names and telephone numbers from their employer, the Board noted; moreover, by prohibiting employees from *sharing* the information of other employees, the employer directly interfered with their right to communicate and engage in organizational activity.

A 2015 version of the rule contained a section instructing employees who participated in outside organizations to remove themselves from any discussion or vote on matters affecting the interests of the employer. This also violated the NLRA, the majority held, because the provision did not offer any qualifications regarding what type of organizations were covered, and thus employees could reasonably construe the provision as restricting their ability to work with labor unions. Moreover, it was overbroad in prohibiting employees from disclosing nonpublic company information because it failed to limit that language to allow employees to discuss their terms and conditions of employment.

Dissenting in part, Miscimarra argued that *Lutheran Heritage's* "reasonably construe" standard should be replaced by a standard that would evaluate an employer's rule or policy and would consider both the legitimate justifications for the rule and any adverse impact on protected rights. He also advocated for overturning the *Purple Communications* standard, which he asserted improperly presumes that employers that reserve the use of their email systems for business purposes unreasonably impede their employees' ability to engage in protected activities. There are a wide range of digital platforms, including social media and texting, which allow employees to communicate, he pointed out. Moreover, the standard fails to acknowledge employers' property rights in their email systems and makes it difficult for them to enforce rules prohibiting solicitation during work hours.

**Cancelling strikers' health benefits unlawful.** An employer violated the NLRA by cancelling the accrued health benefits of employees who went out on a brief strike, a divided three-member Board panel ruled in *Hawaiian Telecom, Inc.* Under the applicable bargaining agreement, the employees' eligibility for benefits had accrued and was not dependent upon their continued performance of work. The employer also failed to establish a legitimate and substantial business justification for discontinuing the striking employees' benefits, the majority determined.

But Miscimarra argued, in a lengthy dissent, that denying medical benefits is an economic weapon protected by the Act, and the Board was not empowered to second-guess the employer's reasonable interpretation of the CBA. When the Board evaluates whether medical benefits are "accrued," its "role is limited to determining whether the employer relied on an interpretation of the contract that is 'reasonable and ... arguably correct,'" Miscimarra asserted. Further, medical coverage is considered a welfare benefit under the Employee Retirement Income Security Act (ERISA), and ERISA principles apply to medical benefits even when provided in a CBA. Arguing that the medical benefits had not accrued, he urged that absent unusual circumstances not presented here, the right to strike did not include an entitlement to receive wages or benefits during periods that employees perform no work because of the strike.

**Unlawful change in working conditions.** A nursing home management company acted unlawfully when an administrator threatened to "call the cops" after

housekeeping employees protested their "re-hiring" as probationary employees at the starting wage, with no seniority, and demanded to contact their union, a three-member panel of the NLRB ruled in *HealthBridge Management, LLC*. The Board also found that the employees retained their rights under a bargaining agreement and that the employer's attempt to extinguish those rights constituted an unlawful midterm modification of the CBA.

Miscimarra agreed that the employer violated the NLRA by eliminating the housekeeping employees' seniority, and that an administrator violated the Act when he advised employees they would not have a job unless they reapplied for their positions. He also would have found the threat to call police unlawful because it reasonably tended to coerce employees into forfeiting accrued seniority. He argued, however, that the employer lawfully subcontracted its housekeeping function and that the subcontractor was the sole employer of the housekeeping employees during the relevant time period. Thus, he disagreed that the employer's actions violated the Act after housekeeping operations were subcontracted.

**"Not part of the uniform."** In response to an employee's inquiry whether he could wear a "Fight for Fifteen" button on the job, a supervisor unlawfully replied that the "button was not part of [the company] uniform." The employee would reasonably infer from that statement that he was being told he could not wear the button, in violation of Section 8(a)(1), a three-member panel of the NLRB ruled. Moreover, the Board adopted a law judge's finding that the employer unlawfully maintained a rule prohibiting employees from wearing unauthorized buttons or insignia and unlawfully told another employee to remove his button. Acting Chairman Miscimarra dissented in part (*In-N-Out Burger, Inc.*).

Restricting employees from wearing buttons and other insignia can be lawful if the employer shows such items would unreasonably interfere with the employer's public image. But the Board determined that in this instance, the employer presented insufficient "public image" evidence to render lawful its directive barring employees from wearing the small button on their uniforms. Moreover, the Board held a nationwide remedy was proper here, since the employer's dress and grooming policy applied companywide to all of its 300-plus restaurants, and the employer repeatedly cited the importance of the "consistency" of customer experience from store to store.

Acting Chairman Miscimarra, while agreeing there was inadequate evidence to support a public image defense, specifically rejected the ALJ's reasoning that such a defense was undermined by evidence that employees occasionally wore employer-supplied buttons reading "Merry Christmas," or referring to a charity. He also rejected "any implication that [purveyors of] conventional products (such as hamburgers, french fries, and soft drinks) could never warrant maintenance of a public image that, in turn, could constitute 'special circumstances' justifying a restriction on buttons and pins."

## Agency guidances

**General Counsel: college football players are "employees."** In August of 2015, the NLRB declined to assert jurisdiction over a petition for a union election among scholarship football players at Northwestern University. In declining to assert jurisdiction, the Board itself found it unnecessary to reach the issue as to whether the student athletes were statutory "employees" under the NLRA. In January of this year, however, the Board's General Counsel, Richard F. Griffin, Jr., issued a [memorandum](#) concluding that the Northwestern University football players are, in fact, statutory employees and are entitled to the NLRA's unfair labor practice protections. Thus, in the view of the General Counsel, although the Northwestern players, and presumably other scholarship athletes, may not have the ability to unionize under the Board's representation case procedures, they may still avail themselves of the Act's unfair labor practice processes and protections.

**The class action waiver battle.** Although the Supreme Court had agreed in January to take up the question of whether class and collective action waivers in employment arbitration agreements violate the NLRA and whether the Federal Arbitration Act nonetheless trumps the NLRA, this closely watched high court battle has now been delayed until the Court's next term. After the Court granted certiorari, however, the Division of Operations-Management of the

Office of the General Counsel issued a [memorandum](#) on the impact of the grant of certiorari in *National Labor Relations Board v. Murphy Oil USA*, along with *Epic Systems Corp. v. Lewis* (Seventh Circuit) and *Ernst & Young v. Morris* (Ninth Circuit), the other class waiver appellate decisions that will be considered by the high court.

In cases alleging that the employer is either maintaining and/or enforcing an agreement prohibited under *Murphy Oil*, the memorandum directs the agency's regional offices, in cases deemed to have merit, to propose that the parties enter informal settlement agreements that are conditioned on the Board prevailing before the Supreme Court in all three cases. Where a charge contains both an allegation that the employer has been maintaining and/or enforcing an unlawful *Murphy Oil* agreement, as well as an allegation that is *not* related to that agreement, regions should propose that the parties enter into an informal settlement agreement relating to the *Murphy Oil* allegation conditioned on the agency prevailing before the Supreme Court. If the parties are unwilling to settle the unrelated allegations, regions should go forward on those charges found to have merit.

**Fact sheet on unlawful retaliation.** The NLRB, the Department of Labor's Wage and Hour Division, the Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission issued a joint fact sheet explaining that the agencies will protect all employees from employer retaliation arising from the employee's attempt to assert his or her workplace rights, according to [NLRB Memorandum OM 17-10](#). The federal agencies' fact sheet, *Retaliation Based on Exercise of Workplace Rights Is Unlawful*, notes that in some cases, employers may exploit immigration status to discourage workers from asserting their rights. Federal laws, however, including the NLRA, generally prohibit employers from retaliating against workers for exercising their workplace rights, regardless of the workers' immigration status. ■

## Coming up...

### The Trump Board

President Trump's nominations to fill the current vacancies on the NLRB are imminent, and likely will be confirmed by the summer. In the next issue of the *Practical NLRB Advisor*, we will profile the new Board members and discuss the top 10 cases a new Board will likely reconsider.

How should employers proceed given the expected changes to Board law? Ogletree Deakins' Traditional Labor Practice Group attorneys will offer some pointers.

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