

# Insight

IN-DEPTH DISCUSSION

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## Employees, Political Advocacy and the NLRB - What Can an Employer Do?

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In the first few weeks of the Trump Presidency, there have been numerous marches, protests and other forms of political advocacy expressing views both in support of and in opposition to the President's various appointments, executive orders and other actions. Employers concerned about protests potentially planned for the next few months and political advocacy in general understandably have questions surrounding how political demonstrations may affect their workplaces.

Several news articles and an event website have called for a "general strike" and "occupation of public space in protest of the Trump administration's refusal to Honor the Constitution of the United States of America" on or around February 17, 2017. The "demands" of the strike have been reported to be:

1. No Ban, No Wall. The Muslim ban is immoral, the wall is expensive and ineffectual. We will build bridges, not walls.
2. Healthcare For All. Healthcare is a human right. Do not repeal the ACA. Improve it or enact Medicare for All.
3. No Pipelines. Rescind approval for DAPL and Keystone XL and adopt meaningful policies to protect our environment. It's the only one we've got.
4. End the Global Gag Rule. We cannot put the medical care of millions of women around the globe at risk.
5. Disclose and Divest. Show us your taxes. Sell your company. Ethics rules exist for a reason and presidents should focus on the country, not their company.

This article addresses questions employers may have regarding this general strike and ongoing protests, such as: What if some of our workforce calls out? Can we refuse employees a day off to "strike" for

these purposes? Can we discipline and/or fire them for taking the day off? If not, can we still count the absence as unexcused? And what if we have a CBA in place with a “no strike” clause?

## When Is Political Advocacy Protected Activity under the NLRA?

In *Eastex, Inc. v. NLRB*,<sup>1</sup> the Supreme Court held that employees are engaging in protected “mutual aid or protection” under Section 7 of the National Labor Relations Act when they seek to “improve their lot as employees through channels outside the immediate employee-employer relationship.” However, the Court noted that this principle should not be applied in a way that nearly all political activity – no matter how far removed from the employee’s workplace – would be deemed protected. Relying on *Eastex*, the Board has found certain political activity to be protected as sufficiently employment-related (such as lobbying to reduce immigration and protect U.S. jobs), while finding that certain other activity is not (such as protesting health care staffing levels to improve patient safety).<sup>2</sup>

As stated in a 2008 General Counsel (“GC”) Memo,<sup>3</sup> “the Board looks to 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.”

Using the General Strike as an example, it is unlikely its focus on oil pipelines’ and the environment or the global “gag rule” would be deemed sufficiently employment related. On the other hand, the General Strike also protests repeal of the Affordable Care Act (“ACA”), which mandates that almost all medium to large employers provide health care benefits for their employees. It is likely this Board (with two Democratic members still forming the majority) would find that a repeal of the ACA has a sufficient nexus to the workplace such that any protests related thereto would be protected by the NLRA. However, just because a protest or strike related to political advocacy would be protected does not mean employers have no recourse or ability to manage their employees who engage in such advocacy.

## What Can an Employer Do to Preserve Continued Operations and/ Manage a “Sick Out” When the Conduct Is Protected Activity?

Importantly, the GC’s 2008 Memo notes that, even though certain political advocacy may be protected by the NLRA, “the means employed to carry out that advocacy” may not be protected. The memo directly addresses the question of whether employees can call out of work (or “strike”) to protest even NLRA-protected political advocacy.

The GC’s 2008 Memo specifically agreed with *Eastex*’s dicta, suggesting that “economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the outcome of that dispute.” Moreover, “conduct with a protected object may nonetheless be unprotected because of the means employed...” In noting that the “the right to strike ‘is not absolute’ or ‘without limitation,’ the GC’s memo concluded that “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.”

At the end of the day, employers cannot discipline or retaliate against employees who engage in NLRA-protected political advocacy off duty and on their own time. However, action may be taken against on-duty employees, employees who call out sick or those that are a no-call/no-show in order to engage in such

1 *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978).

2 Indeed, the Board has found that participating in or supporting an internal union election is protected political activity. *See, e.g., United Technologies*, 279 N.L.R.B. 973, 975 (1986).

3 GC 08-10 *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, pp. 6-7 (July 22, 2008).

advocacy, in accordance with neutral work rules (*i.e.*, ones that do not discriminate based on the nature of the action). For example, if neutral, consistently applied work rules so provide, an employer facing the General Strike may be able to: (1) refuse to grant the day off; (2) count the absence against the employee for disciplinary purposes; or (3) terminate the employee for the absence, a no-call/no-show or a refusal to appear for work after the request for the day off is denied. Moreover, to the extent an employee is subject to a CBA with a broad “no strike clause” precluding all strikes, including political ones, the employer may be able to invoke the CBA to take disciplinary action.

Note, however, that additional considerations may complicate any disciplinary action. For example, numerous jurisdictions have paid sick leave laws that prohibit employers from: (1) denying employees the right to call out “sick;” (2) disciplining them for doing so; and (3) asking for proof that the employees were actually sick unless they have been out for 3 days or more. In such jurisdictions, absent Facebook photos, Twitter posts, witnesses or other evidence that the employee was not, in fact, “sick” and, rather, was abusing the paid sick leave entitlement as a political protest (whether protected or not), it may be difficult for the employer to effectuate any discipline.

Circumstances will undoubtedly vary by jurisdiction and from employer to employer, but all employers should have a plan in place to deal with unscheduled absences, a mass call-out, or other acts of political advocacy by employees, as such acts may be protected by the NLRA and warrant proceeding with caution. If you are confronted with political activity in your workplace, it is advisable to contact experienced labor counsel.