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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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DOL TO BACK OFF ENFORCING LAWS IN UNIONIZED WORKPLACES

In a New York University Conference on Labor and Employment Law, Labor Solicitor Jonathan Berry said the Department of Labor (DOL) continues to "disfavor pursuing enforcement in workplaces covered by collective bargaining agreements (CBA) where they provide adequate and regularly implemented remedies." The idea is to leave the enforcement of such employment law violations to the union, unless there is "credible evidence that the union is not fairly representing workers," or if "remedies for violating a CBA are insufficient in that particular case."

Editor's Note: While this is not an iron clad rule, unionized employers may have more comfort. It appears to be more a matter of prioritizing the DOL's resources. Employers receiving such complaints from federal enforcement agencies should be quick to remind them of this policy. The policy applies to wage-hour, child labor, workplace safety laws, as well as many other laws.

REPUBLICAN NLRB MAJORITY MAKES FIRST SHIFT IN LABOR POLICIES

The National Labor Relations Board (NLRB or Board) has changed its policies in situations in which employee outbursts pertaining to legitimate employer policies also contain some type of protected activity. An earlier ruling during the Biden Administration called *Lion Elastomers* found an employer violated the Labor Act in disciplining a worker for his part in a confrontation during a safety meeting. It set forth three standards used for specific settings: one applying to employee interactions with management, another governing picket-line interactions, and a third involving social media posts and most cases involving employee conversations in the workplace. These tests required employers to give leeway for workers to exercise their protected rights during labor disputes that get heated. It has been applied to finding labor act violations when employees wrote "Whore Board" on an overtime sign-up sheet, shouting racist taunts at striker replacements, and posting on social media that a manager is such a "nasty m—------ f-----."

The result is that the current NLRB, with its new 3-member Republican majority, will begin applying a different test known as the Wright Line test. This test applies when the NLRB accuses employers of punishing workers for taking Labor Act-protected actions, such as raising safety concerns, and employers claim they could act for legal reasons in taking these actions. Under the Wright Line test, the NLRB must first make out a case that the employer punished the worker for a protected action, and then the employer gets a chance to show it would have done the same thing even if the worker had not taken the protected action.

Editor's Note: While applying the Wright Line test for employee misconduct in such situations is good news for employers, the rationale used by the new NLRB was controversial, in that it did not directly over-rule the

earlier *Lion Elastomers* ruling, but instead followed a circuit court of appeals 2024 ruling setting aside that case. The new test and case is *Lion Elastomers LLC*, Case 16-CA-190681 (9/23/26).

NLRB GUIDANCE MEMO NARROWS PROTECTED ACTIVISM

Oftentimes workers engaged in that one might call political activism, and are restricted or disciplined in doing so by their employer. Sometimes employer discipline is claimed by the protestors to be illegal, as in some way they were protesting some type of employer action or inaction. These issues have been difficult for the NLRB to resolve.

On July 10, 2026, the NLRB Division of Advice issued a Memo in a case involving Microsoft, concluding that Microsoft lawfully discharged two employees who organized and conducted a protest on company property after refusing directives to relocate the activity off-site. The activism encouraged employees to participate in a walk-out, vigil, speaker series and fund raiser opposing what organizers described as industry support to "Israel's apartheid and genocide." The publicity did not otherwise identify workplace concerns as a purpose of the event. Under a Supreme Court ruling in 1978, employee advocacy on political issues can be protected, but only when bearing a sufficient connection to employees' interests as employees.

The Advice Memo indicates that employees must be seeking to improve their lot as employees to be entitled to Section 7 mutual aid or protection, and at some point the relationship between the activity and employees' interests become too attenuated to warrant protection. Under the particular facts, the Advice Memo concludes that the protest was primarily intended to pressure Microsoft to sever business ties with the Israeli government, and related matters, and thus was directed principally at political and humanitarian objectives, rather than improving employees' working conditions.

In the Advice Memo, there is a discussion of the 2024 NLRB decision in *Home Depot*, where the Board found protected activity between a "BLM" message and concerns about workplace discrimination. The Board in that case found that an activity remains protected if improving work conditions is among its objectives, even if other objectives are also present. In the current situation, the Advice Memo found the protest had no workplace objective at all.

Editor's Note: It should be noted that the *Home Depot* case remains NLRB precedent, although the Advice Memo notes that NLRB General Counsel Crystal Carey disagrees with that decision and seeks to reverse it in the future. These developments indicate the current General Counsel addressing unfair labor practice charges may require political or social activism to be genuinely directed to improving employees' terms and conditions of employment, rather than broader political, social or humanitarian objectives. It should also be noted that even workplace issues are not protected by Section 7 if employees are merely expressing personal views, rather than seeking group action or workplace change.

OPINION - RESPONDING TO A PLAINTIFF ATTORNEY'S DEMAND LETTER

When employees are represented by attorneys, it is common for such plaintiffs' attorneys to send a "demand letter" to the employer. Such letters make impressive demands and expressly give the employer the "opportunity" to negotiate settlement without litigation. How should the employer respond?

There are several options to the employer, including ignoring the demand, providing a short response denying violation of the law, and giving a detailed response and possibly even some proof. There are pros and cons of each approach.

Some employers worry that a failure to respond at all suggests to others that the claims are true. On the other hand, the employer is to some extent "bound" by its response, because if the employer gives inappropriate reasons or later changes the reasons offered, the plaintiff will contend that such changes show a pretext and discrimination. The employer's response also gives plaintiffs information to perfect or improve their claims.

In this writer's opinion, the best answer to the dilemma must be decided on a case-by-case basis. At a minimum, however, it is suggested that the employer's attorney make a concise response denying the plaintiff's claims, indicating that any further communications regarding a claim should be made to the employer's attorney. Inasmuch as a legal claim has been made against the employer by virtue of the plaintiff's letter, pertinent records must be preserved even though they would ordinarily be removed or destroyed under the employer's record retention policies. Further, employers should begin an internal investigation of the claims while the evidence is still available and fresh.

EEOC REDUCES TIME FOR EMPLOYER TO RESPOND TO DISCRIMINATION CHARGES

According to announcements from the Equal Employment Opportunity Commission (EEOC) in October, the EEOC has reduced the time period for employers to respond to discrimination charges from 30 to 15 days. The hope of the Agency is that speeding up the process will allow the Agency to reduce its backlogs. No announcement has been made as to whether the EEOC intends to shorten the timeline for claimants to respond to employer position statements, as the employer's responses to the charges are now shared with the Charging Party. In theory, if employers fail to submit timely position statements, the EEOC may move ahead and issue a determination letter stating there is reasonable cause to believe that discrimination has occurred. Lawyers have expressed concern that preparing a defense to a discrimination charge requires comprehensive investigation and may take some time. Reportedly, the EEOC offices are also cutting the length of extension of time deadlines given to employers. An EEOC spokesperson has indicated that the employer "response deadlines may vary among EEOC offices."

Editor's Note: Employers should make sure incoming communications from government agencies are directed to a responsible employer official immediately, as timely investigations and responses must be made by employers. The emphasis on speedy deadlines also requires employers to communicate with their attorneys earlier.

EEOC RESOLVES GENDER LOCKER ROOM DISCRIMINATION CHARGE

The EEOC just resolved a sex discrimination and retaliation charge where the EEOC accused a municipality of not providing a sex-specific locker room for use by women only. The EEOC said in a statement in September that the City of O'Fallon, Illinois, would have likely violated Title VII when it subjected an employee to harassment by its failure to provide a women's only locker room for her use. The EEOC under the Trump Administration has shown it will prioritize preserving women's-only spaces at work, and confirms what it calls "the biological and binary reality of sex." President Trump has ordered federal agencies to recognize only two sexes, overruling the Biden Administration's guidance that an employer may not deny a worker the use of facilities aligned with their gender. The City agreed to resolve the charge by designating separate locker room and shower facilities for men and women.

NEW EEOC ENFORCEMENT PLAN CHANGES PRIORITIES

In June, the U.S. Equal Employment Opportunity Commission (EEOC) voted to replace a Biden-era enforcement plan for one that establishes employer's diversity, equity and inclusion efforts, anti-American bias and religious discrimination as key priorities. A priority targeting DEI initiatives will look at race or sex-based quotas and career development programs aimed at a particular demographic, and go after anti-American discrimination. EEOC Commissioner Panuccio stated that: "It is not about replacing one set of favorite groups with another set of favorite groups. This is about applying the same law to everyone," she said. Defending women's right to single-sex spaces at work is also a priority, as well as emphasis on a worker's right to religious accommodation. EEOC Chair Andrea Lucas stated that "the National Enforcement Plan reaffirms the Agency's unwavering commitment to merit-based, even handed enforcement of our nation's civil rights laws." She also emphasized that the EEOC will prioritize intentional discrimination and that every worker must be treated as an individual under the law.

ADMINISTRATION EXPANDS NON-TRADITIONAL HEALTH PLANS ON OBAMACARE EXCHANGES

In May, the Trump Administration finalized a rule permitting low-premium, high-deductible plans in the ObamaCare exchanges, and allowing them to last up to 10 years. The rule also adds the flexibility of certifying plans with no traditional doctor network. These plans are often known as "catastrophic" level plans, allowing cost-sharing approaches to encourage patients to stick with them for multiple years. These plans previously were generally limited to those under 30 years old who didn't qualify for a particular hardship exemption.

Editor's Note: Politicians continue to debate whether only health plans with good benefits should be allowed to be offered on the ObamaCare exchanges, or whether more affordable "catastrophic" plans should also be allowed. Some politicians contend that no insurance is preferred over a substandard insurance plan.

TPS UPDATE (as of 10/20/2026)

The Trump Administration has succeeded in terminating TPS status for people from several countries. This update provides information about the remaining countries for which TPS status remains available. If a country is not listed below, the employer should determine whether an employee with TPS status has work authorization for a different reason. Also, a person may lose work authorization but still have TPS status.

El Salvador--An announcement on El Salvador's TPS will be made at the appropriate time. Until such announcement is made, Salvadoran individuals present in the U.S. under TPS retain protection including work authorization, if they had work authorization on September 9, 2026.

Lebanon - The TPS designation of Lebanon is automatically extended for 6 months, from May 28, 2026, through Nov. 27, 2026. USCIS automatically extended the validity of EADs previously issued under the TPS designation of Lebanon for six months, from May 28, 2026, through Nov. 27, 2026.

Sudan - An announcement on Sudan's TPS will be made at the appropriate time. Until such announcement is made, Sudanese individuals present in the U.S. under TPS retain protection including work authorization, if they had work authorization on October 19, 2026.

Ukraine - An announcement on Ukraine's TPS will be made at the appropriate time. Until such announcement is made, Ukrainian individuals present in the U.S. under TPS retain protection including work authorization, if they had work authorization on October 19, 2026.

Visit www.uscis.gov/humanitarian/temporary-protected-status for more information.

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