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Proposed NLRB-EEOC Memo On Racially-Charge Picket Line Speech Paused Pending Hearing

Labor Relations Update on **June 4, 2024**

As we've discussed previously (see here and here), the National Labor Relations Board ("NLRB") has recently endeavored to work collaboratively with other federal agencies to combat workplace issues where multiple agencies may share jurisdiction. One such effort is the publication of a joint memo between the Equal Employment Opportunity Commission ("EEOC") and the NLRB regarding picket-line speech that may be racially-charged.

While the agencies announced in March that a joint memo was forthcoming, *Bloomberg Law* recently reported that on April 3, 2024, Republican EEOC Commissioners Keith Sonderling and Andrea Long voted to pause the joint-memo initiative until a public hearing can be held on the draft—the EEOC's three Democratic Commissioners voted to finalize the memo.

The two Republican EEOC Commissioners told *Bloomberg Law* that their decision to "agenda" the memo came from their desire to have public input on this issue. The EEOC responded in a statement to *Bloomberg Law* that it could not confirm nor deny whether an issue is undergoing deliberation, and as of the date of this post, no hearing date has been set.

Proposed Joint NLRB-EEOC Memo

The proposed joint memo between the EEOC and NLRB intends to assist employers dealing with situations where workers use offensive language against others crossing an established picket that could raise harassment concerns, but could also qualify as protected activity under the National Labor Relations Act ("NLRA").

This gray area has vexed employers and employees, and the joint memo intends to make clear what the agencies' positions are in these circumstances—of course, subject to review when applied in particular circumstances by the NLRB and/or the courts.

The proposed joint memo corresponds with a period of heightened activity at the EEOC, as the agency has recently released final guidance on harassment in the workplace, and published its final rule regarding the Pregnant Workers Fairness Act. (See our discussion here.)

Recent NLRB Precedent – Lion Elastomers

The proposed joint memo follows the NLRB's decision last year in *Lion Elastomers*, 372 NLRB No. 83 (2023) (discussed here).In that case, the NLRB reinstated the use of context-specific standards for determining whether an employer violates the NLRA by disciplining an employee for abusive conduct, including abusive conduct occurring on picket lines.

The NLRB held that an employee loses the NLRA's protection for picket-lined conduct where "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercises of rights protected under the Act." As we noted here, the NLRB decision in *Lion Elastomers* was appealed to the Fifth Circuit, and oral argument was held on April 29. 2024. A decision by the Court of Appeals remains pending.

We will continue to follow the agency developments, as well as the forthcoming decision by the Fifth Circuit in *Lion Elastomers*.

View original.

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