OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-03 **March 31, 2021**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter Sung Ohr, Acting General Counsel

SUBJECT: Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines

In 1937, the United States Supreme Court made clear that, under Section 7 of the National Labor Relations Act, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. […] That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937). Section 8 prohibits discrimination against employees who exercise their Section 7 rights.

Eighty-four years ago, the Supreme Court upheld the constitutionality of the NLRA, guaranteeing workers the fundamental right to self-organize at the workplace. Since the passage of the Wagner Act, experience has made it clear that employee demands for this fundamental right do not materialize out of thin air. Often employees engaging in concerted activities for the mutual aid or protection of one another recognize the benefits of group action or collective bargaining. While protected, concerted activity can be a precursor to a union campaign, it also can occur outside of the context of union activity, such as in instances where employees raise safety concerns to their employer, or seek protection from government agencies. Nonetheless, constraints and limitations placed on employees engaging in concerted activities, and adverse actions taken against them in response to their protected activity, serve to effectively undermine the declared policy of the United States.

As a consequence of the COVID pandemic, health and safety issues have unfortunately become more prevalent at the workplace. This memorandum focuses on protecting employees' fundamental rights by examining an interrelated framework of basic, yet pivotal, legal constructs.

I. Mutual Aid or Protection in Today's Landscape

Section 7 grants employees the right to engage in "concerted" activities for the purpose of "mutual aid or protection." The latter element "focuses on the *goal* of concerted activity," specifically, "whether there is a link between the activity and matters concerning the workplace or employees' interests as employees."[1] The Board analyzes whether an activity is for "mutual aid or protection" using an objective standard; thus, employees' subjective motives are irrelevant.[2] The "mutual aid or protection" clause covers employee efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship," as well as activities "in support of employees of employers other than their own."[3]

Section 7 protection applies not only to union activity and labor organizing; it may also cover the fundamental precursor actions that form the cornerstone of any other actions the employees may take, like discussing or protesting wages, hours, and working conditions. Additionally, employee advocacy can have the goal of "mutual aid or protection" even when the employees have not explicitly connected their activity to workplace concerns.[4] This includes employees' political and social justice advocacy when the subject matter has a direct nexus to employees' "interests as employees."[5] Examples include: a hotel employee's interview with a journalist about how earning the minimum wage affected her and employees like her, and how legislation to increase the minimum wage would affect them; a "solo" strike by a pizza-shop employee to attend a convention and demonstration where she and others advocated for a $15-per-hour minimum; and protests in response to a sudden crackdown on undocumented

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[1] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (emphasis in original).

[2] *Id.*

[3] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 559-60, 565 (1978).

[4] *See Petrochem Insulation*, 330 NLRB 47, 49 (1999) (union filing environmental objections and challenging issuance of permits was for mutual aid or protection because objective was to secure living wage for employees at non-union construction companies), *enforced*, 240 F.3d 26 (D.C. Cir. 2001); *Tradesmen International*, 332 NLRB 1158, 1159-60 (2000) (union organizer's testimony before city building standards board urging application of surety bond requirement to labor supply firm was for mutual aid or protection because testimony "designed to protect local unionized companies and, in turn, the job opportunities of their employees" by leveling the playing field between union and non-union contractors), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002); *Nellis Cab Co.*, 362 NLRB 1587, 1588 (2015) (extended break during which taxicab drivers drove down boulevard honking and flashing lights while refusing to pick up passengers was for mutual aid or protection where object was to protest taxicab authority's possible issuance of additional medallions, which would likely decrease drivers' pay).

[5] *Eastex*, 437 U.S. at 565-67.

immigrants and the possible revival of workplace immigration raids.[6] In each instance, the employees' conduct had the objective goal of improving their workplaces and concerned issues within their employer's control, like payment of wages and employers' willingness to hire immigrants. Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act.

I look forward to robustly enforcing the Act's provisions that protect employees' Section 7 rights with full knowledge that recent decisions issued by the current Board have restricted those protections. Notably, the majority opinions in two decisions—*Alstate Maintenance*[7] and *Quicken Loans*[8]—applied "mutual aid or protection" narrowly. Nevertheless, the Board majority has left avenues for demonstrating mutual aid or protection that should be fully utilized.

In *Alstate*, a Board majority found that an airport skycap's comment to his supervisor that he and other skycaps did not want to assist with a soccer team's equipment because "[w]e did a similar job a year prior and did not receive a tip for it," was not for mutual aid or protection, even though the bulk of skycaps' compensation came from customer tips.[9] The majority reasoned that skycaps' tips were within the customers' sole discretion, a "matter from which the skycaps' employer is essentially detached," and that the comment was not aimed at improving skycaps' lot as employees, e.g., through recourse to administrative, legislative, or judicial forums.[10] The majority observed, however, that skycaps' comments about customer tips would be for "mutual aid or protection" if they were aimed at changing employer policies or practices.[11]

In *Quicken Loans*, a Board majority found that an employee's comments to a coworker about having to handle a customer call that was a "waste of time" was not for

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[6] *Days Inn & Suites*, Case 15-CA-147655, Advice Memorandum dated Aug. 10, 2015; *Papa John's Pizza*, Case 10-CA-192458, Advice Memorandum dated Sept. 8, 2017; *JVS Masonry, Inc.*, Cases 27-CA-194772, et al., Advice Memorandum dated Aug. 30, 2017; *EZ Industrial Solutions, LLC*, Case 07-CA-193475, Advice Memorandum dated Aug. 30, 2017.

[7] 367 NLRB No. 68 (2019); *see id.*, slip op. at 9-18 (McFerran, dissenting).

[8] 367 NLRB No. 112 (2019).

[9] *Id.*, slip op. at 8-9.

[10] *Id.*, slip op. at 8. In her dissent, Member McFerran observed that the skycaps, like the rest of the tipped workforce (the majority of whom are restaurant workers), are entitled to a federal minimum wage of $2.13 per hour, and that for most of these employees, including the skycaps here, "discussions about the amount of tips directly concern their compensation, are integral to their 'interests as employees,' and are thus for 'mutual aid or protection.'" *Id.*, slip op. at 16 (McFerran, dissenting) (quoting *Eastex*, above, at 567).

[11] *Id.*, slip op. at 9.

the purpose of mutual aid or protection because there was no evidence that the conversation concerned improving working conditions.[12] Specifically, the majority found there was an "evidentiary hole in the record," i.e., no record evidence that the customer referral was based on an employer policy or practice, that the two employees or any other employee had experienced or anticipated similar referrals, or that such referrals adversely affected their terms and conditions of employment.[13]

Although the Board majorities in *Alstate* and *Quicken Loans* failed to find that the employees' actions were in furtherance of their mutual aid or protection, they identified a number of factors which, if present, would have favored a finding of protection. Going forward, under the framework of the law as presently articulated, cases involving retaliation against concerted employee conduct will be vigorously pursued, where these and other factors exist to tie workers' protests to their interests as employees.

II. Finding Certain Conduct to be Inherently Concerted

Protected, concerted activity – either standing alone or as a precursor to organizational activity – begins with a conversation among employees. Recognizing this, the Board has long described concerted activity "in terms of interaction among employees."[14] Conduct generally becomes concerted when it is "engaged in with or on the authority of other employees,"[15] or when an employee seeks either "to initiate or to induce or to prepare for group action."[16] However expressed, the touchstone of concert revolves around employees' intention to band together to improve their wages or working conditions. Thus, employees may act in concert when discussing shared concerns about terms and conditions of employment, even when the discussion "in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."[17]

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[12] 367 NLRB No. 112, slip op. at 3. Then-Member McFerran did not reach the "mutual aid or protection" question in *Quicken Loans* because she agreed that the employees' conversation was not concerted and would dismiss on that ground alone. *Id.*, slip op. at 3 n.8.

[13] *Id.*, slip op. at 3.

[14] *Meyers Industries*, 268 NLRB 493, 494 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB* , 755 F.2d 941 (D.C. Cir. 1985), cert. den. 474 U.S. 948 (1985).

[15] *Id*. at 497.

[16] *Meyers Industries,* 281 NLRB 882, 887 (1986) *(Meyers II),* affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[17] *Meyers I*, 268 NLRB at 494 (quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951)).

While contemplation of group action may be indicative of concerted activity, it is not a required element. Employee discussions of certain "vital elements of employment"[18] often raise concerns that are pivotal to their collective interests, which, in some circumstances, may spur organizational considerations. Concern about these crucial common issues may render group discussions inherently concerted, "even if group action is nascent or not yet contemplated."[19] No "magic words" are required for concert to attach, and a finding of concerted activity is not dependent on the extent to which other employees agree with the complaint or join in the protest.[20] The Board has adopted this "settled doctrine" of inherent concert for decades, noting that unit employees' right to protect their fundamental, collective interest in these central issues, "could be rendered meaningless if employers were free to retaliate against employees on the ground that the retaliatory action was directed only at a discussion."[21] Although the Board in recent years, most prominently in *Alstate,* has narrowed the circumstances under which individual complaints are considered concerted activity, the doctrine of inherent concert retains its vigor.

To date, the Board has held that employee discussions were inherently concerted where they involved only certain vital categories of workplace life. Employees who share information with each other about wages or wage differentials may be acting in an inherently concerted manner, insofar as,"[i]t is obvious that higher wages are a frequent objective of organizational activity."[22] Discussion among employees of changes in their work schedules implicates vital elements of employment such as hours and working conditions, and thus "are as likely to spawn collective action as the discussion of wages."[23] Similarly, job security is a "vital term and condition of employment," which involves "the very existence of an employment relationship," e.g., whether an employee may be laid off or discharged.[24] The Division of Advice has further concluded that

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[18] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enf. den. in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996).

[19] *Hoodview Vending Co.*, 359 NLRB 355, 357 (2012) (*Hoodview I)* (finding discussions regarding job security inherently concerted).

[20] *Fresh & Easy Neighborhood Market,* 361 NLRB at 154.

[21] *Hoodview I*, 359 NLRB at 358. While the doctrine is long-standing, depending on the factual circumstances, it remains better articulated as an alternative argument in cases where concert may be proven by traditional means.

[22] *Trayco of S.C., Inc.,* 297 NLRB 630, 634. (1990), *enf. denied mem*. 927 F.2d 597 (4th Cir. 1991) (quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)).

[23] *Aroostook County*, 317 NLRB at 220.

[24] *Hoodview Vending Co.,* 362 NLRB 690 n.1 (2015) (*Hoodview II*) (discussions of job security, like wages, are inherently concerted; employer violated Section 8(a)(1) by discharging employee for discussing another employee's job security). See also *Food Services of America, Inc.,* 360 NLRB 1012, 1014-15 (2014) (same)*; Component Bar Products,* 364 NLRB No. 140, slip op. at 1 n.1 (2016) (same).

discussions concerning workplace health and safety[25] and racial discrimination[26] may be inherently concerted. In the future, I will be considering these and other appropriate applications of the inherently concerted doctrine in suitable cases.

Our focus here is on the means to safeguard employee rights to engage in protected, concerted activity in order to redress an employer's retaliatory response. Recognition of these measures will afford the Agency the means by which to better serve the policies of the United States as set forth in Section 1 of the National Labor Relations Act, to "eliminate the causes of certain substantial obstructions to the free flow of commerce […] by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

/s/

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[25] *North West Rural Electric Cooperative*, Case 18-CA-150605, Advice Memorandum dated September 21, 2015, at 9-12. In *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. 1, n.1 (2018), the Board declined to pass on the judge's conclusion that an employee's discussion about safety issues in the electrical lineman industry over Facebook was inherently concerted, in light of an alternate theory of concert.

[26] *Milford Center*, Case 01-CA-156820, Advice Memorandum dated January 20, 2016, at 9-12. The Division of Advice noted that, "[a]n employer's racial bias or discrimination […] implicates all terms and conditions of employment—including, but not limited to, those the Board has already identified as being inherently concerted, such as wages, work schedules, and job security." *Id.* at 11.