OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-04 **January 16, 2025**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Harmonization of the NLRA and EEO Laws

I am issuing this memorandum in response to questions I have received from some stakeholders who have sought guidance on how to address simultaneously the requirements of the National Labor Relations Act (NLRA) and the Federal Equal Employment Opportunity Laws (EEO laws). This memo emphasizes the importance of complying with all requirements of the NLRA and the EEO laws and offers suggestions in certain key areas on how to effectuate compliance and ensure that employees receive full protections under the laws.

Broadly speaking, the NLRA empowers employees to have a voice in the workplace by guaranteeing them the right to act together to improve terms and conditions of employment through engaging in union and/or protected concerted activities. The EEO laws, such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, among others, ensure that employees do not suffer discrimination in working conditions or face workplace harassment because of their protected characteristics, such as race or sex. These bodies of law often work independently of each other, though workplace situations do arise that implicate both.

As the General Counsel of the National Labor Relations Board (NLRB), I am committed to fully enforcing the NLRA in order to protect workers' statutory rights, to promoting fair and just workplaces, and to ensuring that our Agency functions effectively and harmoniously with the Equal Employment Opportunity Commission (EEOC). As to the latter, I note that the laws that the NLRB and EEOC are charged to enforce can and must both be given effect without doing damage to either. In workplaces across the country, the NLRA and the EEO laws routinely operate in harmony, often in furtherance of shared goals and with reliance on shared principles. Such harmonization is possible because neither body of law sets forth absolutes in areas of potential overlap. Each leaves space for the other to operate. Regulated parties thus can and must understand and comply with both sets of laws. Importantly, they should not purport to invoke their obligations under one to avoid their responsibilities under the other.

Consistent with that understanding, in this memorandum, I share respective missions, emphasize the many ways in which I believe the NLRA and the EEO laws work together

both doctrinally and practically, address key areas most often shared as sources of purported conflict, and offer suggestions on addressing perceived tensions. Of course, individual cases will continue to be evaluated on the particular facts presented.

I. The NLRA and the EEO Laws Further Similar Goals and Rely on Similar Principles

The NLRA and the EEO laws share many similar principles and goals. Identifying those shared aspects helps pave the way towards a better understanding of how they can both be successfully given effect.

Underlying both bodies of law is a commitment to dignity in the workplace. A key component of that mission is furthering anti-discrimination principles. I firmly believe that both bodies of law remove obstacles to the full participation of employees in the workforce by prohibiting employers from targeting them for adverse treatment based on statutorily protected characteristics or actions.

The NLRA includes a guarantee that employees have the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] It ensures their ability to speak and act together, to help and protect each other, in their working lives. To safeguard that right, the NLRA prohibits employers from taking actions that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the statute.[2] It also forbids "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[3]

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[4] That prohibition encompasses harassment based on those characteristics that "has created a hostile or abusive work environment."[5] Similar bans on discrimination and harassment exist under the Age Discrimination in Employment Act and the Americans with Disabilities Act, as well as the other EEO laws.

Both the NLRA and the EEO laws also include anti-retaliation protections for employees who invoke the procedures for effectuating each law's substantive guarantees. Employers violate the NLRA when they "discriminate against an employee because he has filed charges or given testimony" with the NLRB or otherwise participated in NLRB processes.[6] Similarly, Title VII prohibits employers from retaliating against employees

[1] 29 U.S.C. § 157.
[2] 29 U.S.C. § 158(a)(1).
[3] 29 U.S.C. § 158(a)(3).
[4] 42 U.S.C. § 2000e-2(a).
[5] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).
[6] 29 U.S.C. § 158(a)(4).

because they have “opposed any practice made an unlawful employment practice” under that statute or because they have “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” related to discrimination or harassment.[7] The other EEO laws contain similar prohibitions on retaliation.

In addition, the NLRA and the EEO laws share a similar set of tools for serving their statutory missions. When evaluating whether employer actions were unlawfully motivated by protected concerted activity (under the NLRA) or by protected characteristics (under the EEO laws), they rely on similar analytical concepts. In cases involving discipline, both bodies of law look to whether the employer’s actions reflect consistency and proportionality. For example, they consider disparate treatment of similarly situated employees as evidence of unlawful motive. They examine whether the reasons given for an adverse action are pretextual, such that the employer’s proffered rationale was not actually relied on. By contrast, under either body of law, evidence showing that an employer consistently applies established policies can weigh against finding a violation.

Along with their conceptual similarities, the NLRA and the EEO laws work in tandem in practice. Employees engage in NLRA-protected activity when they band together to challenge discrimination or harassment in the workplace.[8] EEO goals are also advanced by the NLRA’s protection of employees’ right to discuss terms and conditions of employment with each other or with third parties.[9] Through those NLRA-protected conversations, a victim of discrimination or harassment can learn whether co-workers have suffered the same harm, which may set the groundwork for future joint action to address the EEO violations. Employees could work together to raise the issue with management, alert the public, and/or file a charge with the EEOC—all of which would be protected activity under the NLRA.[10] Further, the same actions that constitute protected concerted activity under the NLRA may qualify as protected opposition or participation under the EEO laws. Robust protection of NLRA rights thus can further EEO goals as well as NLRA goals.

II. Both the NLRA and the EEO Laws Can and Should Be Given Effect

Despite those broad areas of similarity and complement, as noted previously, some stakeholders have shared concerns about perceived tensions between the NLRA and the EEO laws. As explained below, any possible tensions are less stark than commonly believed and they diminish greatly upon a closer look at the specifics of the two bodies of law. To that end, I will address three key areas most often identified as sources of purported conflict—workplace civility rules, investigative confidentiality policies, and

[7] 42 U.S.C. § 2000e-3(a).

[8] *See, e.g.*, *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 11 (2020); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014).

[9] *See, e.g.*, *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1171-72 (1990).

[10] *See, e.g.*, *N.C. Prisoner Legal Servs., Inc.*, 351 NLRB 464, 467 (2007).

employee speech or conduct in the context of NLRA-protected activity that could potentially implicate federal EEO law. For each area, the interests implicated under both the NLRA and the EEO laws are described, and suggestions to serve both sets of interests are offered.

A. Workplace Civility Rules

The first area that some stakeholders have raised involves employer-imposed workplace rules prohibiting harassment and promoting civility. Carefully crafted, such rules can further both NLRA and EEO goals.

First and foremost, I emphasize that workplace civility rules are completely distinct from workplace anti-harassment policies. Specifically, workplace anti-harassment policies are employer rules or policies that prohibit employees from engaging in harassing conduct on the basis of an EEO-protected characteristic. The purpose of anti-harassment policies is not to create a courteous environment like civility rules, but rather to prevent and address an unlawful hostile work environment under the EEO laws. These policies are important for employers who seek to establish workplaces devoid of unlawful harassment, as well as those who wish to avail themselves of an affirmative defense to liability, or limitation on damages, under the EEO laws. Thus, an employer can avoid implicating potential EEO and NLRA concerns by maintaining and consistently enforcing an EEO anti-harassment policy or rule that specifically prohibits harassment based on EEO-protected characteristics. Such policies would not raise NLRA concerns.

In contrast, workplace civility rules are rules that require employees to observe certain standards of workplace behavior or conform to a certain level of conduct. Specifically, they often regulate or prohibit behavior that does not necessarily contribute to or rise to the level of unlawful harassment under the EEO laws. For example, civility rules may prohibit conduct that is either insufficiently severe or pervasive to be considered unlawful harassment under the EEO laws or even is entirely unrelated to an EEO-protected basis.

To determine whether maintenance of a workplace rule, including a civility rule, violates the NLRA, the NLRB uses an objective standard assessing whether a rule has a reasonable tendency to chill employees from exercising their Section 7 rights.[11] This standard does not depend on the employer's intent in promulgating the rule or whether it actually dissuades any employees from engaging in NLRA-protected activity. Rather, the NLRB evaluates rules from the perspective of a reasonable employee, who is economically dependent on the employer, and who contemplates engaging in NLRA-protected activity.[12] It recognizes that the typical employee reads work rules like a layperson, not a legal expert.[13] If an employee could reasonably interpret the rule to restrict or prohibit Section 7 activity, the rule is presumptively unlawful. The employer

[11] *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2 (2023).
[12] *Id.*
[13] *Id.* at 9.

may rebut the presumption by showing that the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule.[14]

Civility rules that are too vague or overly broad risk curtailing employee rights and protections afforded by the NLRA by interfering with workers' ability to advocate for better working conditions.[15] Because collective action to improve terms and conditions may be adversarial in nature, it can lead to heightened tensions and heated disputes among both employees and employer representatives and agents. We have seen cases where employees who complain about or challenge their working conditions have lawfully introduced a degree of conflict to the workplace. Employees have the right under the NLRA to criticize their employer, whether to fellow employees, the public, or government agencies like the NLRB.

When employees reasonably could view broadly worded rules requiring workplace civility to prevent them from engaging in NLRA-protected activity, such rules may run afoul of the NLRA's prohibition on employer actions that interfere with, restrain, or coerce employees in the exercise of their NLRA rights, including by chilling employees from engaging in protected concerted activity at all for fear of retaliation or discipline. In other words, faced with a broad civility rule, employees are likely to take a cautious approach rather than risk violating the rule and be subject to adverse consequences to their livelihood. Moreover, in addition to the chilling effect of overbroad or ambiguous civility rules, employers have used such rules as pretext for prohibiting NLRA-protected activity or disciplining employees who engaged in such activity.

Such rules also could dissuade employees from filing charges with or otherwise assisting the NLRB, out of fear that doing so would constitute the type of conflict or negativity prohibited by the rule. Because the NLRB cannot institute proceedings on its own, the effect of such hesitation would be that unfair labor practices could go unaddressed and unremedied.

Overbroad rules also can undermine the concerted efforts of employees to promote EEO goals. Banding together to challenge sexual or racial harassment by other employees or supervisors, for instance, is not necessarily a civil exercise, particularly when considering the power dynamics often at play in those situations. Employees fearful of violating broadly worded civility rules thus may feel compelled to remain quiet about such harassment, which results in the perpetuation of the existing hostile work environment.

In sum, workplace rules that are narrowly tailored, focused, and precise are most likely to further both NLRA and EEO goals. For example, a rule that specifically prohibits harassment based on EEO-protected characteristics would not raise any concerns under the NLRA. Employers and employees alike could benefit from standalone rules of this nature, disambiguated from broader rules regarding respect or civility in the workplace. Any broader rule is best positioned to avoid conflicting with the NLRA if it is defined and

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[14] *Id.* at 2.

[15] The Board has described an overbroad rule as a rule that "could be narrowed to lessen the infringement of employees' statutory rights while still advancing the employer's interest." *Id.* at 14.

specific, with examples of the types of language and conduct it does and does not cover, and includes assurances, proximate to the rule itself, that the rule does not limit employees' ability to communicate with each other, third parties, or their employer about their terms and conditions of employment, to make comments critical of their employer, or otherwise to engage in NLRA-protected activity. The objective is to head off truly abusive or harassing behavior based on protected characteristics while leaving space for vigorous exercise of protected concerted activity for mutual aid or protection. This goal can and should be met.

B. Investigative Confidentiality

A second area of purported conflict is the extent to which employers can require confidentiality in the context of workplace investigations into alleged harassment based on EEO-protected characteristics. As an initial matter, any overlap between the two bodies of law regarding investigative confidentiality is limited to those situations and does not extend to other types of investigations. Even in that context, investigative confidentiality rules are neither always required for EEO purposes nor always prohibited by the NLRA. In this area, too, room exists for both bodies of law to be enforced in a complementary manner.

1. NLRA and EEO Interests Regarding Investigative Confidentiality

Employees have the right under the NLRA to discuss terms and conditions of employment with their coworkers. The NLRA also protects employee communications regarding such issues with third parties, such as unions, government agencies like the NLRB or EEOC, the media, or the public.[16] Employees are not limited to addressing work-related complaints solely with their employer.

The right to discuss terms and conditions of employment encompasses discussion of workplace investigations. In that context, such protected communications can include discussions of the discipline threatened or imposed as a result of the investigation, the fairness or effectiveness of the investigation, and the underlying subject of the investigation.[17] Both reporting and accused employees engage in NLRA-protected activity when they seek support from fellow employees, such as by soliciting coworkers to provide information or serve as witnesses. The subject of an investigation who feels the employer is unfairly targeting her (perhaps in retaliation for NLRA-protected activity) or the complainant who believes the employer is not doing enough to investigate or resolve a complaint likewise have the right to ask for help from third parties.

Broadly and generally worded investigative-confidentiality rules interfere with that right, and thus can violate the NLRA. For example, rules that preclude *any* communication about the allegations and investigation or that are applicable to *any* employee—victim,

[16] *See, e.g.*, *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1171-72 (1990).
[17] *Inova Health Sys.*, 360 NLRB 1223, 1228 (2014), *enforced*, 795 F.3d 68 (D.C. Cir. 2015).

witness or third party—could be problematic for a number of reasons. Specifically, mandating confidentiality requirements on employees, particularly those who made the report that initiated an internal investigation, may improperly restrict employees from exercising their rights or engaging in protected activity under the NLRA or the EEO laws. Maintenance of such rules can cause employees to think twice before exercising their rights or convince them not to exercise those rights at all. The right to communicate is a core component of Section 7, and limits on that right would prevent employees who are under investigation, initiated an investigation, or are otherwise involved with an investigation from learning about and providing support to other employees who are in a similar situation. It also would interfere with employees' Section 7 right to raise concerns regarding matters related to the investigation with third parties like the media or the public. Similarly, enforcement of overly broad confidentiality rules against employees who have exercised their NLRA right to communicate can constitute unlawful retaliation.

Overbroad investigative-confidentiality rules also could dissuade employees from reporting unlawful conduct to the NLRB for fear of violating their employer's instruction to keep the matter confidential. Because the NLRB depends on private parties to initiate unfair-labor-practice proceedings, that restraint would inhibit the Board from investigating any matter that is the subject of or otherwise related to an employer's investigation. In unionized workplaces, such rules also have the potential to interfere with employees bringing complaints that are the subject of or are related to an employer investigation to their union in order to get help in seeking redress from their employer. They also can dissuade employees from utilizing the contractual grievance machinery for handling workplace disputes.

I recognize that employer efforts to comply with their EEO obligations may include maintaining robust reporting systems for allegations of discrimination or harassment, and fair and effective processes for investigating such complaints, and that important to the success of such systems is ensuring that employees who suffer or witness harassment are not discouraged from coming forward out of privacy concerns or for fear of retaliation.[18] However, I believe employer investigations can and should be structured to satisfy both sets of interests.

2. Crafting Investigations to Satisfy Both the NLRA and the EEO Laws

As with the other areas of potential overlap discussed above, neither the NLRA nor the EEO laws impose absolutes in the area of investigative confidentiality. Rather, confidentiality is a means to the end of fair and accurate investigations, not a standalone requirement or goal in and of itself under EEO laws.

As noted, I recognize that, in some cases, confidentiality may serve as a key component of an employer's anti-harassment policy or investigation. Employers may have goals of

[18] *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

encouraging reports of harassment, protecting employee privacy, and promoting accurate and fair investigations. However, they must avoid improperly restricting employees from exercising their rights or engaging in protected activity. One way to do so is by recognizing that these goals can be met through other means without imposing broad-based confidentiality rules on employees.

As to encouraging reporting, any concern that employees will not come forward because of fears of reprisal can be addressed by maintaining strong anti-retaliation policies and ensuring that employees are aware of them. Rather than demand confidentiality, an employer can advise interviewees of the specifics of its anti-retaliation policy and make clear the steps that it will take should it determine that there has been retaliation, and thus a violation of that policy. Similarly, the employer can provide the reporting employee with assurances of protection against retaliation. It also should scrutinize its own actions and ensure that employment decisions affecting the reporting employee or other interviewees during and after the investigation are not based on retaliatory motives. Notably, the focus on anti-retaliation is not just complementary with NLRA law. It also aligns with an employer's obligations under the EEO laws, as an employer can be liable for co-worker retaliation that would dissuade an employee from making or supporting harassment allegations if the employer tolerates or fails to take reasonable steps to address such retaliation.

As to protecting privacy, an employer itself can keep information it learns during the investigation confidential to the extent possible. It can require confidentiality of any supervisors or members of management interviewed as part of the investigation. Supervisors and management are not typically covered by the NLRA, so confidentiality rules binding them do not offend the NLRA. It can also assure a reporting employee that it will share information with other interviewees only as needed to conduct an effective investigation.

To the extent an employer maintains investigative-confidentiality rules for employees, they can and should be carefully tailored. The NLRA does not prohibit all investigative-confidentiality rules for employees. In certain circumstances, a rule that is found to have a reasonable tendency to chill employees from exercising their Section 7 rights could be lawful if the rule advances legitimate and substantial business interests that cannot be achieved with a more narrowly tailored rule.[19] In other words, employers have the flexibility to request confidentiality in a tailored manner when it is truly needed, and employees should retain their right to discuss workplace investigations when it is not. Such principles are consistent with the confidentiality necessary for effective anti-harassment investigations under the EEO laws.

Employers should consider the context of the particular investigation before requesting or requiring confidentiality of employees. For example, an employer can consider whether

[19] *See Stericycle*, slip op. at 2.

victims or witnesses need protection from continued harassment or discrimination; whether there are objectively reasonable grounds for believing that evidence is at risk of being destroyed or that interviewees are colluding to fabricate testimony; or whether victims request confidentiality to protect against retaliation. As to the latter point, it can take steps to honor a reporting employee's own request for confidentiality, such that, if the reporting employee's identity comes to light in the course of interviewing other witnesses, for example, the employer can ask the interviewees to keep that identity confidential. There also may be a specific need for a stricter confidentiality rule in a particular investigation if the nature of the allegations being investigated is highly sensitive (e.g., an investigation of alleged sexual or racial assault).

If confidentiality in a particular investigation is truly needed, it is important for employers investigating a discrimination or harassment complaint to clearly identify the scope of the confidentiality requirement to interviewees, including the information and matters it covers and how long it lasts, so that employees do not misunderstand the breadth of information covered and the applicable length of time. Employers also may consider reminding participants at multiple points in the process (when scheduling interviews, at the end of interviews, and when finalizing statements/affidavits with witnesses) that their participation in the investigation does not preclude them from: contacting or filing a charge with the EEOC or NLRB; filing a lawsuit under the federal EEO laws; or seeking outside legal or medical assistance (such as mental health treatment for emotional distress or medical assistance for victims of sexual assault). Employers may also remind participants that their participation in the investigation does not preclude them from speaking with other employees, unions, government agencies, or third parties.

In addition to respecting employees' NLRA right to communicate, an approach to harassment investigations not centered solely or primarily on confidentiality can promote the NLRA's and the EEO laws' shared interest in fair and accurate investigations and protected activity under their respective statutes. Overly broad investigative-confidentiality rules can compromise the efficacy or legitimacy of an investigation. A victim or witness who wishes to retain the ability to discuss the matter may choose not to participate in the employer's internal reporting system or the investigation. Also, employees bound to confidentiality would not be able to call out a deficient investigatory process as not fair and accurate. Another benefit of a targeted approach to investigative confidentiality is that it reflects the fact that not all confidentiality rules further EEO goals to the same degree. For instance, a rule requiring reporting employees to keep their own harassment complaints confidential has no connection to the goal of encouraging reporting.

Overbroad confidentiality rules also can interfere with the ultimate goal of investigations—rooting out and combatting harassment. A victim of harassment who is interviewed as part of an investigation into a different employee's harassment claim would have difficulty offering support and solidarity to, or seeking it from, the other employee. In cases where multiple employees have reported harassment, such rules could prevent those

employees from learning about their shared harm. Those obstacles to sharing their experiences interfere with employees' ability to join together and mount a concerted response to challenge the shared harassment or the workplace culture that enabled it. And, broad investigative confidentiality rules even could dissuade employees from going to the EEOC or the NLRB for fear of violating their employer's instruction to keep the matter confidential.

Finally, the EEO laws cannot reasonably be invoked to justify the maintenance of investigative-confidentiality rules that apply across the board to all types of workplace investigations. As noted above, EEO interests are implicated only in investigations that involve harassment or discrimination. Relying on EEO obligations to maintain broader investigative-confidentiality rules that apply outside of that context thus can create conflict between the NLRA and the EEO laws where none would otherwise exist. Consistent with the above discussion regarding civility rules, crafting investigative-confidentiality rules that are narrowly tailored, focused, and precise, rather than ones that are overly broad in scope, would minimize any potential conflict between the NLRA and the EEO laws.

C. Employee Conduct in the Course of NLRA-Protected Activity

A third area where parties have sought guidance involves employee use of offensive language or conduct implicating EEO-protected characteristics while engaged in NLRA-protected activity, and what actions employers can take in response to avoid EEO liability while not running afoul of the NLRA. Employers often express concern that imposing disciplinary action for conduct that may constitute or contribute to a hostile work environment under federal employment discrimination laws may pose NLRA liability risks, while refraining from disciplinary action may pose liability risks under the EEO laws. Here, too, the respective laws can operate harmoniously.

Employees may engage in a range of conduct or speech in connection with Section 7 activity under the NLRA, which sometimes includes the use of insults, obscenities, or other vulgar language or mannerisms. Such employee conduct also sometimes implicates federal employment discrimination laws and a hostile work environment if it is related to an EEO-protected personal characteristic. While there may be tension between these two areas of law, as explained below, employers may take steps to comply with both their NLRA and EEO obligations.

Compliance with both the NLRA and the EEO laws in these situations requires consideration of the employee's conduct, the employer's policies and practices, and the employer's response. Conduct that is not based on or motivated by a protected characteristic typically would not implicate the EEO laws. However, offensive conduct by employees in the course of Section 7 activity that does implicate those laws may warrant disciplinary action, and employers may be able to act without violating either set of laws. In determining whether to impose discipline, employers may consider the nature of the conduct, including whether and in what manner EEO-protected characteristics are implicated, as well as the context in which the discipline occurred, including whether the

disciplinary action is proportionate to the severity of the conduct and consistent with employers' lawful prior practices and applicable policies regarding the EEO laws. As explained in greater detail below, employers that routinely and consistently engage in preventive and corrective actions to comply with applicable legal standards under the EEO laws and the NLRA may be better positioned to defend related disciplinary action.

1. Interaction of NLRA and Federal EEO Requirements

Under the EEO laws, for language or conduct to constitute unlawful harassment, it must be sufficiently severe or pervasive to alter an employee's working conditions and must be both objectively and subjectively offensive.[20] That determination is based on the totality of the circumstances, including the frequency of the offensive conduct, whether it is physically threatening, and the degree to which it interferes with an employee's work performance. *Harris*, 510 U.S. at 23. Other relevant factors include the identity of the harasser, whether the conduct was directed at a particular individual, and who witnessed the conduct.[21] Whether an employer is liable for a hostile work environment depends on the source of the harassment. Employers are vicariously liable for supervisor-based harassment if it results in a tangible employment action or if the employer failed to exercise reasonable care to prevent and correct the harassing behavior and the employee unreasonably failed to avoid the harm.[22] As to co-worker harassment, an employer is liable for such harassment if it was negligent—that is, if it knew or should have of known of the harassment and failed to act reasonably to address it.[23]

The NLRA prohibits employers from taking action against employees for engaging in NLRA-protected activity, such as advocating for better working conditions or protesting employer actions by striking or picketing. There is no requirement under the NLRA that employees remain temperate or unemotional when exercising NLRA-protected rights.[24]

Discussions about crucial workplace concerns can engender passionate responses. Employees must be able to engage with and seek support from one another to address such concerns, and to confront their employer about them, without fear of reprisal even if those conversations at times get heated. When such discussions occur in the bargaining context, employees must feel comfortable expressing their views without fear of employer retaliation, as one goal of the NLRA is equalizing bargaining power. Without robust protection for such activity, employees may be chilled from exercising their statutory rights. Disciplining employees who exercise their NLRA rights is generally unlawful under the NLRA, so the fact that an employee engaged in certain conduct in the course of NLRA-protected activity, sometimes including the use of offensive language or conduct,

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[20] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); *Meritor*, 477 U.S. at 67.

[21] *See, e.g.*, *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 647 n.2 (7th Cir. 2011); *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 328-29 (4th Cir. 2010).

[22] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-65 (1998); *Faragher* , 524 U.S. at 807-08.

[23] *Vance v. Ball State Univ.*, 570 U.S. 421, 424, 427 (2013).

[24] *Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at 11 (2023), remanded on other grounds, 108 F.4th 252 (5th Cir. 2024); *see generally Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966) ("Labor disputes are ordinarily heated affairs ….").

does not necessarily permit an employer to impose what would otherwise be unlawful discipline.

The NLRB seeks to ensure that employers do not discipline employees for offensive conduct during the course of NLRA-protected activity, unless the conduct is such that the employees lose NLRA protection.[25] The NLRB's analysis of whether the employee's conduct loses the protection of the NLRA depends on the conduct at issue, the context in which the conduct at issue occurred, and whether the employee's conduct occurred at or outside the workplace.[26] For interactions with management in the workplace, the Board considers the location and subject matter of the interaction, the nature of the employee's conduct, and whether the conduct was provoked by an employer's unfair labor practice.[27] For conversations between employees and most actions outside of the workplace, the Board looks to the totality of the circumstances, including the nature of the employee's language and the surrounding conversation and the employer's past treatment of similar conduct.[28] In cases involving strike-line conduct, the question is whether the employee's conduct would "reasonably tend to coerce or intimidate" other employees in the exercise of their NLRA rights, including the right to participate in or refrain from union activity.[29] When an employer disciplines an employee for conduct in the course of Section 7 activity and the employee has not lost the protection of the NLRA, the employer cannot defend the discipline by claiming that it was not motivated by an intent to interfere with the employee's right to engage in NLRA protected activity.[30]

The NLRB's analysis considers factors that may be relevant when determining whether conduct is prohibited under the EEO laws, and whether employers may be liable under the EEO laws for such conduct. This is particularly so when the Board evaluates the nature of the language or conduct used by an employee in the course of NLRA-protected activity, which is one of the prongs of the loss-of-protection analysis.[31] That prong has overlap with the question of whether the language or conduct is such that it could create a hostile work environment or deter an employee from engaging in activity protected under the EEO laws.

For example, whether the conduct was particularly egregious or severe, or fits into a pattern of offensive behavior, are considerations to assess under the "nature of the conduct" prong.[32] Offensive conduct related to EEO-protected characteristics that is severe or pervasive enough to be considered illegal harassment under the EEO laws would likely be egregious or severe enough to trigger loss of protection of the NLRA.

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[25] *Lion Elastomers*, slip op. at 2.
[26] *Id.* at 6, 8-9.
[27] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).
[28] *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).
[29] *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985). Strike-line conduct has its own standard in part because the NLRA specifically protects the right to strike and provides that nothing therein shall "interfere with or impede or diminish in any way" that right unless specifically provided for. 29 U.S.C. § 163.
[30] *Lion Elastomers*, slip op. at 6.
[31] *Pier Sixty*, 362 NLRB at 506; *Atlantic Steel*, 245 NLRB at 816.
[32] *See, e.g.*, *Kiewit Power Constructors Co.*, 355 NLRB 708, 710 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011).

Offensive language or conduct related to EEO-protected characteristics that may contribute to a hostile work environment but that is not sufficiently severe or pervasive to meet the legal definition of EEO harassment may still weigh towards loss of NLRA protection when the nature of the conduct is assessed.[33]

Employees who persist in using certain language or conduct after being advised not to do so pursuant to a lawful anti-discrimination or anti-harassment policy are more likely to potentially lose the protection of the NLRA than those who do not.[34] The nature-of-the-conduct prong also can take account of the likely impact of the employee's language or conduct on other employees. This includes whether the language or conduct reasonably would negatively impact, on account of their EEO-protected characteristics, other employees' terms or conditions of employment, or their own exercise of NLRA rights. In other words, this prong includes whether such conduct reasonably would make other employees feel less than equal, full-fledged members of the workforce, or less able to participate in activities protected by the NLRA.

The loss-of-protection standards are objective.[35] Evidence of other employees' actual, subjective response to the language or conduct can inform the loss-of-protection analysis but is not essential to it. For example, it can be significant that coworkers filed EEO harassment complaints regarding the employee's language or conduct. However, other employees' subjective reactions alone are insufficient to cause otherwise NLRA-protected activity to lose protection. Similarly, an employer's subjective belief that conduct implicates EEO laws is not grounds for loss of protection unless the employer's belief is also objectively reasonable.

Also relevant to the loss-of-protection analysis is whether the employer has a policy prohibiting the language or conduct at issue. That analysis also considers whether any discipline imposed was consistent with the employer's lawful response to prior similar conduct.[36]

2. Each Law Leaves Space for the Other To Operate

Properly understood, the NLRA and EEO analytical frameworks are complementary and do not conflict. Neither are absolutes that demand that employers always take or refrain from particular actions when faced with offensive employee conduct in the course of NLRA-protected activity. They both can and should be given full effect.

Even when the NLRA is not at issue, per se rules regarding certain types of language or conduct are not the norm because not every instance of racially or sexually tinged language or behavior constitutes an actionable hostile work environment under the EEO laws. As explained above, the conduct must be severe or pervasive and both objectively

[33] *See, e.g.*, *Honda of Am. Mfg.*, 334 NLRB 746, 746-48 (2001); *Advertisers Mfg. Co.*, 275 NLRB 100, 133 (1985).
[34] *See, e.g.*, *Honda*, 334 NLRB at 748.
[35] *See, e.g.*, *Pier Sixty*, 362 NLRB at 506.
[36] *See, e.g.*, *id.*

and subjectively offensive. In addition, I do not believe that the EEO laws require employers to maintain a zero-tolerance policy regarding offensive language or conduct, either before or after the conduct rises to the level of a hostile work environment. Nor do I believe they dictate that an employer responds in any one specific way every time an employee uses offensive language or conduct. Instead, an employer's duty is to take steps reasonably calculated to put an end to the harassment. Thus, the EEO laws leave room for the employer to take into account the circumstances that the NLRB will consider in deciding whether a particular response would violate the NLRA.

In turn, NLRA law considers factors that may also go to whether conduct is prohibited under EEO laws. As discussed earlier, the offensive nature of language used by a disciplined employee in the course of protected activity is relevant to the analysis of whether the discipline was lawful. Whether the conduct was related to EEO characteristics, particularly egregious or severe, targeted a specific individual, or was part of a pattern of such behavior (as opposed to a single, brief, or spontaneous occurrence) are considerations for that analysis. Also relevant is whether the discipline was consistent with the employer's response to prior similar conduct, as is whether the employer has a policy prohibiting the language or conduct at issue. In these ways, NLRA law incorporates in its analysis whether a reasonable employer would anticipate hostile-work-environment liability under the EEO laws if it failed to act in response to the employee's conduct. Thus, the instances in which discipline is most needed to satisfy EEO obligations are likely also instances where an employer can show that the discipline was lawful under the NLRA.

The determination of whether to issue an unfair-labor-practice complaint in a particular case is fact-specific and involves careful analysis of all of the circumstances. For example, as General Counsel, I might decline to issue a complaint where an employer took action to address unlawful EEO-based harassment that occurred during the course of Section 7 activity and the facts indicate that such action was proportionate to the conduct at issue and was in line with company policy and past practice of addressing harassment outside the NLRA context. On the other hand, I might issue a complaint on behalf of an employee who engaged in unlawful EEO-based harassment where the employer regularly tolerated unlawful EEO-based harassment by employees and only took disciplinary action in the one instance when an employee engaged in similar conduct in the context of Section 7 activity.

Finally, it is worth noting that the number of scenarios in which both the NLRA and the EEO laws are at play is relatively limited. For employee conduct in the course of NLRA-protected activity to raise EEO concerns, it must involve harassment based on a protected characteristic. Cases involving employees' use of garden-variety insults or general obscenity or vulgarity are less likely to implicate an employer's EEO obligations. Similarly, the NLRA is concerned with employee conduct in the context of protected concerted activity. An employer's response to employees' use of offensive language or conduct outside of that context is unlikely to pose an NLRA issue. In addition, the NLRA's protections extend only to employees, not to supervisors or managers. Employer responses to harassment by the latter thus rarely will implicate the NLRA because it will

not occur in the context of NLRA-protected activity. That fact lessens the possibility of conflict between the two respective laws, because supervisory harassment is more likely than co-worker harassment to create a hostile work environment; the former is inherently more severe because of the supervisor's authority over the employee. For all of these reasons, the universe of potential tension points in this area is limited in scope.

3. Giving Effect to Both Bodies of Law

With the above understanding in mind, an employer can take steps that reflect its obligations under both the NLRA and the EEO laws.

A key way to avoid harassment in the workplace without running afoul of the NLRA is to focus on prevention. By taking proactive steps, parties can deal with the issue of harassment and EEO liability before it arises in the more complicated area of NLRA-protected activity. Prevention can include establishing a culture of a diverse, inclusive, and respectful workplace. Leadership can model respectful behavior and make clear to employees that it supports such values. Preventative measures also can involve training, on both EEO compliance and workplace norms and policies that seek to end harassment before it reaches legally actionable levels. And, as discussed above, employers can establish clear anti-harassment rules and regularly communicate them to employees. So long as these types of preventative measures are clearly focused on harassment, they are unlikely to raise NLRA concerns. Even apart from NLRA considerations, such ex-ante steps are an effective means of furthering the goals of the EEO laws. Although the EEO laws seek to remedy discrimination and harassment, their primary objective is to prevent such harms before they occur.[37]

An employer's response to offensive language or conduct once it already has occurred likewise can satisfy the employer's EEO duties while aligning with its obligations under the NLRA. Because the EEO laws do not mandate a zero-tolerance response, discharge or other disciplinary measures is not automatically required. At the same time, the fact that harassment occurred in the course of otherwise NLRA-protected activity does not foreclose an employer from taking *any* corrective action in response. An employer could remind employees of existing anti-harassment policies and emphasize their importance. It could implement new or revised policies, so long as those policies apply uniformly and were not promulgated in response to NLRA-protected activity. An employer also could instruct employees not to use the particular language at issue. To make clear that the employer's concern is with the language itself rather than the NLRA-protected activity in which it was used, the employer should accompany that instruction with assurances that the underlying protected activity is permissible.

By taking such steps, the employer also positions itself to be able to take more serious action in response to any further incidents with less risk of offending the NLRA. The

[37] *Faragher*, 524 U.S. at 805-06.

employer establishes that its true concern is offensive language, not the protected activity. An employee who continually uses offensive language in the course of protected activity on multiple occasions when it is not otherwise tolerated may lose the protection of the NLRA, especially if they previously had been warned not to do so and were not provoked to do so by the employer.

If an employer does turn to discipline in response to offensive language or conduct in the course of NLRA-protected activity, its actions should embody the principles of consistency and proportionality familiar to both the NLRA and the EEO laws. Employers may not treat employees who have engaged in such conduct in the course of NLRA-protected activity more harshly than employees who engaged in the same conduct in other contexts. Accordingly, employers should consider whether their disciplinary actions are handled in accordance with established organizational policies, agreements, and legal authorities, and are consistent with the employer's past lawful practices. To achieve that goal, employers may ensure that managers who have the authority to impose disciplinary action are aware of and comply with applicable law and organizational policies when making disciplinary decisions, including discipline related to harassing conduct in the Section 7 context. Employers could require that such managers receive training about their responsibilities under the NLRA and the EEO laws soon after hire and on a regular basis thereafter. Effective training in NLRA obligations also would make it less likely that the employer would commit unfair labor practices, which is relevant because whether an employee's conduct in the course of Section 7 activity was provoked by an employer's unfair labor practice is a factor for determining whether the employee's activity retained the protection of the NLRA.[38]

Those shared principles of consistency and proportionality support EEO goals as well as NLRA goals. Importantly, adherence to those principles is not just a matter of accommodating the respective laws, but also of affirmatively furthering both of them. For example, both bodies of law are concerned with employers using an employee's offensive conduct as a pretext to discharge or discipline that employee. Indeed, discipline for purported harassment could mask discrimination based on protected characteristics just as it could mask retaliation for NLRA-protected activity. In addition, employees' use of racially or sexually charged language may occur in the context of opposing harassment or discrimination—efforts that can be protected by both the NLRA and the EEO laws. Employees must be able to engage with and seek support from one another and others to address such concerns, and to confront their employer about them, without fear of reprisal even if those conversations at times get heated. Such conversations may be uncomfortable, but neither the NLRA nor the EEO laws permit, let alone require, employers to squelch them by taking action against the employees who engage in them.

[38] *Lion Elastomers*, slip op. at 20.

III. Conclusion

Every day, in workplaces across the country, the NLRA and the EEO laws work in parallel and in tandem to allow workers to improve their work environments. In circumstances where the NLRA and the EEO laws are most likely to overlap, there are no set absolutes; instead, there is room for both to operate and to be given full effect without doing damage to either.

Through issuance of this guidance memorandum, I emphasize legal rights and responsibilities under the NLRA and the EEO laws and make clear that harmonization of the NLRA and the EEO laws is not only possible, but necessary, in order to fully effectuate the important missions of both the NLRB and the EEOC.

Thank you for your continued dedication in protecting workers' rights, enforcing our statute, and serving the public in a stellar manner. I am proud to work with each and every one of you.

/s/
J.A.A.