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MEMORANDUM

Date: June 23, 2022

To: UNITE HERE Local 33

From: Kristin L. Martin
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Re: International Graduate Workers

Section 7 of the National Labor Relations Act (NLRA) gives "employees" the right to engage in concerted activity for mutual aid and protection, including by forming a union. Graduate workers have these rights because they are employees under the NLRA. *See Trustees of Columbia Univ.*, 364 NLRB 1080 (2016). Immigrants are also employees under the NLRA, regardless of whether they are lawfully present and working in the United States. *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891-892 (1984); *Logan & Paxton*, 55 NLRB 310, 315 n.12 (1944) ("The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis.")

The NLRA makes it illegal for an employer to interfere with employees' exercise of Section 7 rights. This rule applies when an employer threatens an employee's immigration status because the employee has exercised his or her Section 7 rights. "[T]hreats touching on employees' immigration status warrant careful scrutiny," because, "they are among the most likely to instill fear among employees." *Labriola Baking Co.*, 361 NLRB 412, 413 (2014); *see also Viracon, Inc.*, 256 NLRB 245, 247, 252-53 (1981) (recognizing that immigration-related threats "evoke the most intense fear"); *Rubin v. American Reclamation, Inc.*, 2012 WL 3018335, at *3 (C.D. Cal. July 24, 2012) (preliminary injunction entered against employer that made a veiled threat to call immigration authorities because employees were supporting the union). The National Labor Relations Board's General Counsel – the agency's top prosecutor -- has publicly committed to ensuring that immigrants are able freely to exercise their rights under the NLRA:

> In order for all workers to be able to exercise their rights under the Act, we must zealously guard the right of immigrant workers to be free of immigration-related intimidation tactics that seek to silence employees, denigrate their right to act together to seek improved wages and working conditions, and thwart their willingness to report statutory violations. I am resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws.

NLRB Memorandum GC 22-01, at *1 (Nov. 8, 2021).

If Yale were to violate international graduate workers' NLRA rights, the General Counsel could seek the ordinary remedies, which range from an order instructing Yale to stop (a cease and desist order) to an order of reinstatement and back pay if employees lost work. The NLRB General Counsel also coordinates with the federal immigration agencies and has committed to counter retaliatory actions that result in deportation proceedings by seeking "relief including deferred action, parole, continued presence, U or T status, a stay of removal, or other relief as available and appropriate, to protect these workers." *Id.* at *2.

It is common during union organizing campaigns for employers to raise the possibility of a strike as a scare tactic. Strikes involve risk for all employees, but international workers may be uniquely vulnerable to threats about the impact of a strike on their visas. Seeking to exploit this fear, Washington University threatened its international graduate workers that they would "lose their [F-1] visas and have to leave the country" if there were a strike. The NLRB's General Counsel decided that this threat was illegal, explaining that "this was not an accurate statement of the law because a strike would not necessarily lead to the loss of their student visas and the immediate end of their lawful right to remain in the United States." *Washington Univ. in St. Louis*, 2017 WL 7789422, at *4-5 (G.C. Mem. Oct. 31, 2017).

Washington University based its threat on a regulation pertaining to the effect of a strike on F-1 visa-holders' employment authorization. That regulation states:

> *Effect of strike or other labor dispute.* Any employment authorization, whether or not part of an academic program, is automatically suspended upon certification by the Secretary of Labor or the Secretary's designee to the Commissioner of the Immigration and Naturalization Service or the Commissioner's designee, that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place of employment. As used in this paragraph, "place of employment" means the facility or facilities where a labor dispute exists. The employer is prohibited from transferring F-1 students working at other facilities to the facility where the work stoppage is occurring.

8 C.F.R. § 214.2(f)(14). This regulation does not say that a strike results in the automatic revocation of students' F-1 visas. It pertains only to the employment authorization, not the visa; and the employment authorization is suspended temporarily but not revoked. Employment authorization is not suspended until the Secretary of Labor issues a certification that a strike is taking place in the employee's workplace. By itself, the suspension of work authorization during a strike is not a cause of concern because employees do not work during a strike. In fact, the regulation has the beneficial effect of prohibiting the university from trying to compel international graduate workers to work during a strike.

Given this limitation inherent in the regulation, Washington University speculated that suspension of employment authorizations would lead to revocation of F-1 visas and deportation if working were part of the "full course of study" for which the F-1 visas were issued. We don't know any example of this ever happening, and the NLRB General Counsel rejected that it would necessarily transpire for two reasons. First, "[i]n many strike situations, graduate student employees in fact would not lose their visas, given the time that it takes the Secretary of Labor to certify the strike after being notified by the relevant school officials." 2017 WL 7789422, at *5. Second, "the Employer, which is responsible for determining the 'course of study' requirements underlying F-1 visa status, could alter those requirements so as to permit the continuation of student visa status notwithstanding the revocation of work authorization." *Id*. Given the NLRB General Counsel's stated concern with protecting international workers, it is reasonable to expect that, in the event of a strike, she would seek an order compelling the employer to take steps to preserve graduate workers' visas.

There is also strong argument that this regulation is illegal and cannot be enforced because it interferes with international graduate workers' rights under the NLRA. In a suit challenging a similar regulation applicable to H-1 visas, the court so explained:

> The court concludes that the regulation is an impermissible assumption of legislative power which cannot survive examination. The effect of the regulation and its supporting provisions is to run counter to the policy and essential purposes of the National Labor Relations Act and to discriminate against "employees," who would otherwise be protected by the NLRA. While the stated purpose of the offending regulation is to protect "American" labor, it does, in fact, violate the most basic "fair play" and equal treatment principles and, over the long term actually militates against the workers it purports to protect.

WJA Realty Ltd. Partnership v. Nelson, 708 F.Supp. 1268, 1269 (S.D. Fl. 1989). The court declared that regulation invalid and ordered that suspension of the employees' work authorizations be reversed.

There is a final reason why this regulation should not influence the decisions of any graduate workers, including those with F-1 visas, whether to unionize. The UNITE HERE Constitution allows affiliated local unions to call a strike only if authorized by a vote. Thus, the many international graduate workers at Yale will have a say in whether a strike is ever called.