

UNITED STATES GOVERNMENT
National Labor Relations Board
Memorandum



TO: Gwynne A. Wilcox, Board Member
David M. Prouty, Board Member

FROM: Lori Ketcham,
Associate General Counsel, Ethics
Designated Agency Ethics Official

Jamal M. Allen,
Special Ethics Counsel, Ethics
Alternate Designated Agency Ethics Official

SUBJECT: Service Employees International Union v. NLRB, Lauren McFerran, John Ring,
Marvin Kaplan, Gwynne Wilcox and David Prouty, Civil Action No. 21-2443

DATE: October 13, 2021

Executive Summary

This memo provides ethics guidance regarding whether Member Wilcox and/or Member Prouty may participate in the Board's consideration of how to respond to the lawsuit filed by the Service Employees International Union against the Board, and its individual members, challenging the NLRB's joint employer rule. As explained in more detail below, the Ethics Office has concluded that under both the relevant government and legal ethics provisions, Member Wilcox and Member Prouty do not have to recuse from consideration of the lawsuit. Additionally, the Ethics Office considered whether there are appearance concerns under the catch-all provision that would warrant recusal. Our recommendation is that Member Prouty's and Member Wilcox's participation would not raise appearance concerns.


Background

A. (b) (5), (b) (7)(A)


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¹(b) (5), (b) (7)(A)


(b) (5), (b) (7)(A)




B. (b) (5), (b) (7)(A)




(b) (5), (b) (7)(A)




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c. (b) (5), (b) (7)(A)




(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)



²(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

D. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

³(b) (5), (b) (7)(A)

⁴(b) (5), (b) (7)(A)

⁵(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

E. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

Analysis

For purposes of our government ethics analysis, we have evaluated whether Member Wilcox and/or Member Prouty should be recused from participating in the litigation challenging the Board’s joint employer rule under 18 U.S.C. § 208, which is the criminal conflict of interest statute covering conflicting financial interests; the Biden Ethics Pledge (Executive Order 13989); and the Standards of Ethical Conduct for Employees of the Executive Branch regulations (The Standards of Conduct) codified at 5 C.F.R. § 2635.502, covering outside business and personal relationships.⁷ Additionally, we have also considered whether recusal is warranted under the relevant legal ethics rules and as a matter of due process and prejudgment.

A. (b) (5), (b) (7)(A)

1. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

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⁶ (b) (5), (b) (7)(A)

⁷ (b) (5), (b) (7)(A)

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- (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

Accordingly, because their participation in the litigation would not create a financial conflict of interest, neither Member Wilcox nor Member Prouty must recuse under 18 U.S.C. § 208.

2. (b) (5), (b) (7)(A)


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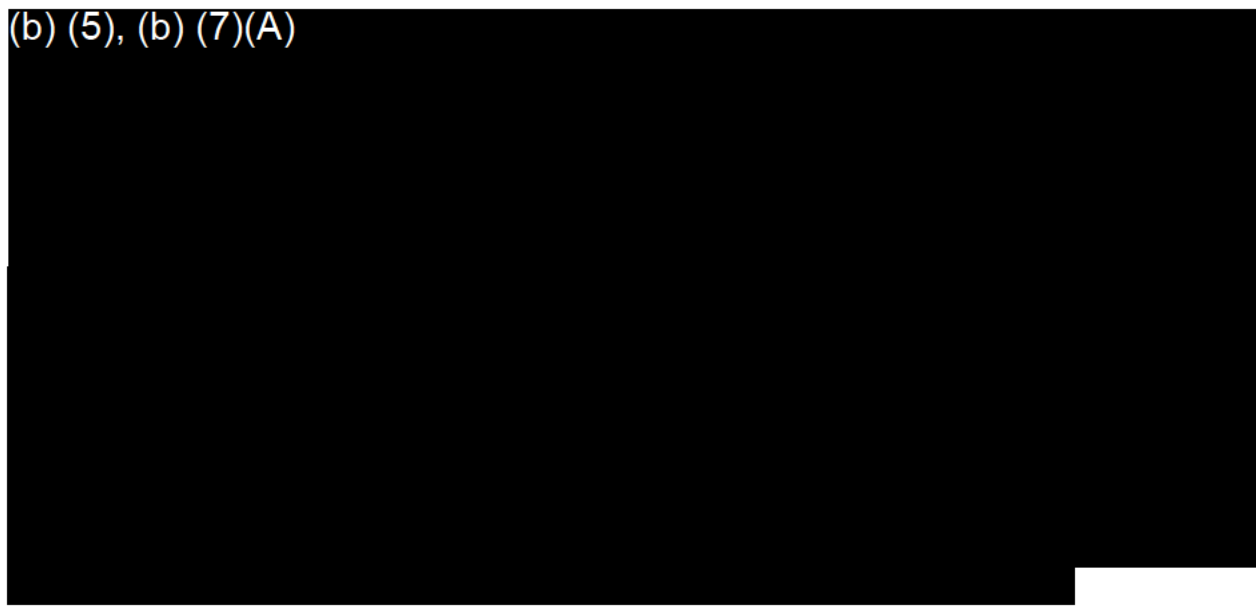
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⁹(b) (5), (b) (7)(A)


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¹⁰(b) (5), (b) (7)(A)

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(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)


(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A) Members Wilcox and Prouty are not required to recuse from *SEIU v. NLRB* under the Biden Ethics Pledge.


3. (b) (5), (b) (7)(A)

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(a) (b) (5), (b) (7)(A)



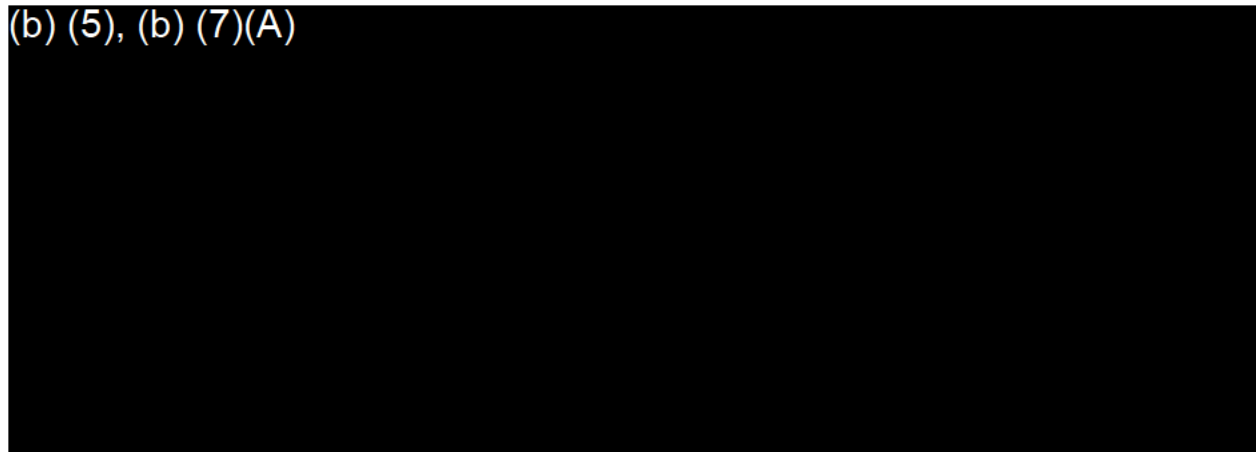
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(b) (b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)



¹²(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)


(b) (5), (b) (7)(A)

because Member Wilcox and Member Prouty have sought guidance from the Ethics Office, we have made an assessment and recommendation. (b) (5), (b) (7)(A)


(b) (5), (b) (7)(A)

¹³(b) (5), (b) (7)(A)

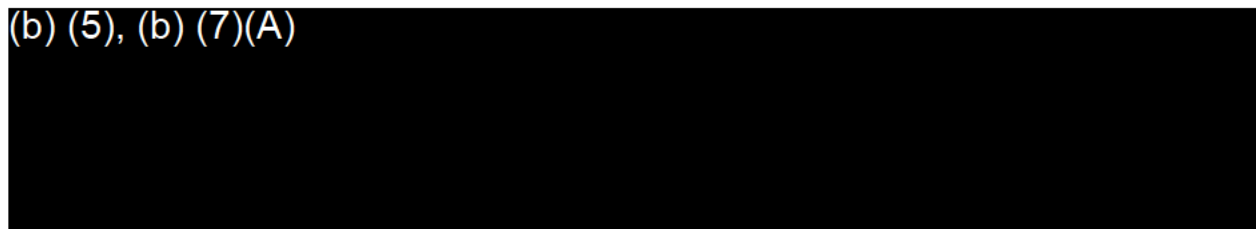
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(b) (5), (b) (7)(A)




¹⁴(b) (5), (b) (7)(A)



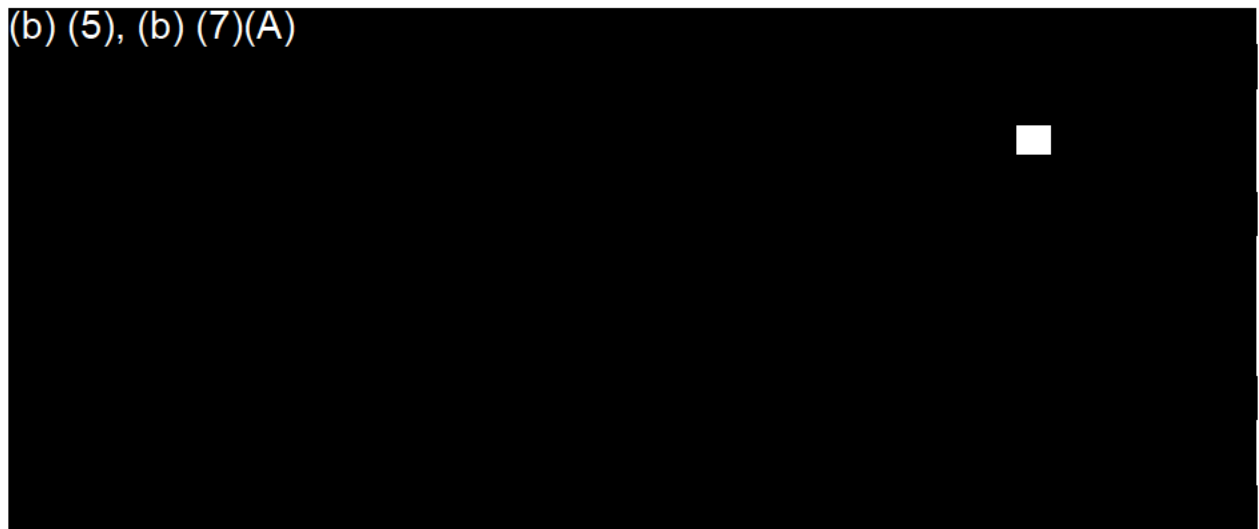
(b) (5), (b) (7)(A)



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(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)

B. (b) (5), (b) (7)(A)

In addition to the government ethics regulations, we have also considered whether there are any legal ethics considerations that may raise recusal concerns in the court litigation. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

¹⁵(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

there are no ethics concerns under (b) (5), (b) (7) legal ethics rules that would prohibit her from participating in the Board's consideration of how to respond to SEIU International's lawsuit.

(b) (5), (b) (7)(A)

we do not believe that the (b) (5), (b) (7) legal ethics rules prohibit Member Prouty from considering how to respond to SEIU International's lawsuit. (b) (5), (b) (7)(A)

C. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

Conclusion

It is our determination that, Member Wilcox and Member Prouty do not have to recuse from the Board's consideration of how to respond to SEIU International's challenge to the Board's joint employer rulemaking based on 28 USC § 208 (the financial conflict of interest statute), Paragraph 2 of the Biden Ethics Pledge, or 5 C.F.R. § 502(a)(1) (covered relationships). We also recommend, for the reasons set forth in this memo, that Member Wilcox's and Member Prouty's participation in the litigation, including consideration of how to respond to the lawsuit, would not raise appearance concerns under the catch-all provision in 5 C.F.R. § 502(a)(2) should they want to do so. We also do not believe that their participation would be prohibited by the relevant provisions of the applicable legal ethics rules or as a matter of due process. (b) (5), (b) (7)(A)

- cc: Roxanne Rothschild, Executive Secretary
- Amanda Jaret, Chief Counsel to Member Wilcox
- David Goldman, Chief Counsel to Member Prouty
- Lara Zick, Deputy Chief Counsel to Member Prouty