



February 2017

Employer Guidance – National Immigrant Protests

In connection with “National Day without Immigrants” held on Thursday, Feb. 16 and Friday, Feb. 17, immigrant employees as well as supporters and sympathizers may have requested time off or, in some instances, called in sick from work to attend protest-related events and activities. Supporters called on the public to refrain from working, opening businesses, and spending money in an effort to show the impact immigrants have on our country each day.

Although having employees absent from work may pose challenges for business operations, it is important to recognize that the decision to participate may be protected in some instances. Congress enacted the [National Labor Relations Act](#) (NLRA) “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy.” More specifically, the NLRA provides that employees are protected under the “mutual aid or protection clause” of Section 7 when they seek to “improve their lot as employees through channels outside the immediate employee-employer relationship.”

Employee protests could be construed as political activity and/or protected concerted activity that relates to the workplace. The line between protected concerted activity and unprotected political activity is obscure. The test set forth by the National Labor Relations Board (NLRB) to determine when employee political advocacy falls within the “mutual aid or protection” clause of Section 7, is whether the subject of the advocacy has a direct nexus to employee working conditions. Here, immigrant employees, and even non-immigrant employees, could reasonably believe that President Trump’s immigration agenda could impact their interests as employees, and thus, their attendance at and support of National Day without Immigrants may fall within the scope of the “mutual aid or protection” clause.

Once an employer has determined that a particular political advocacy falls within the “mutual aid or protection” clause, it must then ascertain whether the means employed to carry out the advocacy is protected. An employer generally cannot discharge or discipline employees for leaving work without permission if their walkout is for the purpose of obtaining some improvement in their working conditions from their employer, unless it is a party to a collective bargaining agreement that provides otherwise. The “National Day without Immigrants” demonstrations present a unique question because, though their subject is related to employee working conditions, the immediate

employer likely lacks the ability to address the underlying dispute. Thus, when these employees leave work in support of a political cause, either to mobilize public sentiment or to urge governmental action, they are not withholding their services as an economic weapon in the employment relationship, and it is unlikely that the walkout itself is protected activity under the NLRA.

To the extent specific facts and circumstances bring the employee's acts under the protections of the NLRA, liability is generally limited to back pay and unwinding discipline such as termination. However, in addition to the protections found under the NLRA, many states have regulations prohibiting retaliation for political activity. For example, in California, employer retaliation against an employee for his or her political activity could result in lawsuits and criminal prosecution. It is important to consider constitutional, federal, state, regional and local laws and rights that may be implicated.

The above analysis is very fact-specific and will not be the same for each employee. Employers should not assume that an employee who has called in sick is participating in protests. Employers should consider following normal company policy when addressing unexpected absences and only addressing the issue of whether an employee has a valid protest-related absence if they voluntarily admit such activities as the reason for their absence.

Some companies are taking this opportunity to show their support for employees' beliefs despite the adverse impact this day may have on the business, and are willing to allow use of paid time off, or even time off without pay. Other companies are not in a position to do so.

As you address the impact of absent employees during times of protest, it is important to consult with counsel, exercise caution, and remember that all employees must be treated equally regardless of their views. A company cannot penalize an employee for expressing his or her political views and no adverse action should be taken against an employee participating in protests as long as the employee engages in lawful conduct while doing so. Employers may continue to apply established and legitimate employment policies without violating these laws. For example, absenteeism, vacation, and personal leave policies may be enforced. Lawfully crafted limits on personal activities in work areas during working time may be enforceable. In the event an employee commits unlawful acts or acts of vandalism in connection with these political protests, it will be important to review your company's policy to determine appropriate action. The NLRA does not protect activities when illegal actions are taken.

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