‘A Day Without Immigrants’ National Strike Planned – What Can Employers Do?

By Philip B. Rosen, Howard M. Bloom, Edward V. Jeffrey and Thomas M. Lucas

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Activists throughout the U.S., but focused in Washington, D.C., are planning a protest that exhorts employees not to report to work on February 16, 2017, as one measure to demonstrate what a “Day Without Immigrants” can mean to the economy.

According to the *Washingtonian*, the campaign, which is directed at the Trump Administration’s immigration policies, is being spread by word-of-mouth, hardcopy, electronic flyers, and on Facebook. At this time, it is unclear whether large numbers of employees will answer the call to engage in the demonstration, including by refusing to report to work. A successful “Day” could have an enormous impact on the retail sector, in particular.

What can employers do if their employees engage in such political advocacy?

Under the National Labor Relations Act, employees have the right to engage in group activity for the purposes of “mutual aid and protection” such as two or more employees acting together and walking off the job to protest working conditions or to enforce demands related to terms of employment, including by engaging in non-disruptive political advocacy on employees’ own time and in non-work areas. Such “protected concerted” activities by employees is protected by the NLRA, and the same is true of non-disruptive political advocacy by employees on their own time and in non-work areas. This is what happened in 2006 when Congress was considering an Immigration Reform Bill. After those protests led to widespread filing at the National Labor Relations Board of unfair labor practice charges involving the discipline of employees who had participated in nationwide and local demonstrations, the NLRB’s General Counsel (its chief prosecutor) issued a guidance to the NLRB’s Regional Directors in 2008.

In that guidance, the General Counsel noted that employee political advocacy (such as participation in such protests as the “Day”) may fall within the mutual-aid-or-protection clause of Section 7 of the NLRA; but only if there is a “direct nexus” between employment-related concerns and the specific issues that are the subject of the political advocacy. The General Counsel took the position that the 2006 demonstrations fell within the scope of the mutual-aid-or-protection clause because they were employment-related — they stemmed from proposed legislation that would impose restrictions on employees before they would be permitted to work in the U.S.

As to the action planned for February 16, the connection with employees’ employment-related concerns may not be as clear-cut and, as a result, activity on the “Day” may not be protected. The Strike4Democracy website cites national political issues as the reason for action — not issues that would be in the control of any individual employer.

Even if the activity is protected, the *means* of engaging in such advocacy may not be protected, according to the General Counsel’s 2008 guidance. In the guidance, the GC stated that when employees leave work in support of a political cause, they are not withholding their services as an economic weapon in their own employment relationship, and that abandoning work to participate is not protected, since their employer has no control over the subject matter of the dispute — passage of the proposed immigration legislation. In that case, the employee on-duty political advocacy (including leaving or stopping work to engage in such political activity) is subject to the restrictions imposed by their employers’ lawful and neutrally applied work rules and employers may impose discipline.

Key Takeaways

Employers who face such work stoppages, or employee absences from work, should make every effort to determine the reason for the absences, whether it relates to any “specifically identified employment

Meet the Authors

Philip B. Rosen

Principal
New York Metro
New York City 212-545-4001
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

Edward V. Jeffrey

Principal
New York Metro
White Plains 914-872-8060
Email

concern in their workplace."

Even if the absence from work is related to an employment concern in their workplace, employers should determine whether the absences violate any "lawful and neutrally applied work rules" before taking action against employees. Any discipline that is imposed should be consistent with discipline imposed in similar, past situations. An employer may want to discuss its analysis with legal counsel before going forward.

Further, employers may want to inform employees about their policies in advance of any action as doing so may cause employees not to engage in the action.

Employers should discuss with legal counsel to determine whether there are any other federal, state, or local laws that might affect its situation.

Finally, employers also should consider the practical implications and ramifications of any decision; there are times when discipline is legally acceptable, but practically less advisable. This is an individual employer's consideration so that the employer's approach fits the facts and circumstances of its workplace. Employees who choose to participate in these protests (or others within the company) may view the issues as deeply personal. Each employer will have to decide how to respond under these circumstances.

Jackson Lewis attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies.

Thomas M. Lucas

Principal
Norfolk 757-648-1424
Email

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