

Labor Law Bulletin

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Immigration Rally Planned On May 1: How Should Employers Respond?

May 1, 2006 has been declared “*A Day Without Immigrants*” by community, civil rights and labor organizations. Rallies in major cities across the country are planned to protest pending federal legislation to strengthen immigration law enforcement and border security. Organizers seek to build on the momentum of the 120-city rally staged earlier this month. Media reports predict that a million workers will leave their jobs on May 1 (“Rally Day”) to participate and wear white armbands in solidarity. The prospect of last-minute absences or walkouts has employers concerned about appropriate legal responses. Here are some guidelines to consider as you plan.

Public relations. The earlier protests generated considerable negative publicity for employers in Illinois, Wisconsin, Michigan and Texas. Newspapers reported on employers who discharged employees for leaving work to attend the rallies, only to rehire them after local community and immigration interest groups helped them file charges with the EEOC and NLRB. This has become a major issue for unions like the Service Employees International Union (SEIU) and its Change to Win Coalition partners that are likely to launch media and/or organizing campaigns against selected employers who discipline employees for attending the upcoming Rally Day.

“Protected Activity” under the NLRA? The National Labor Relations Act does not permit an employer to discipline or threaten to discipline employees who participate in “protected concerted activity” for their “mutual aid and protection.” In many cases, a strike or walkout is the sort of protest the NLRA protects. For most employees, particularly those that do not wear uniforms or deal directly with the public, wearing armbands or buttons is also protected. Although some protections of the NLRA apply only to union employees or to union organizing, both union and nonunion employees have a protected right to engage in concerted activity, including political protests that have a viable connection to workplace issues and are of legitimate interest to employees in general. The NLRB and courts have found violations in the past where employers disciplined employees who supported legislation that would have allowed additional foreign workers into the country, who opposed state right-to-work laws, and who supported increases in the federal minimum wage. Some employers with union contracts may be able to argue that the union has waived the right of employees to engage in such conduct. However, contract language and past practices should be carefully reviewed to confirm that this is the case. Although employees may have protected rights in this area, managers and supervisors do not, and employers can direct them to report to work without fear of an NLRA violation.

Is it certain that a walkout to oppose tightened immigration restrictions is protected? No. But if disciplining absent workers is going to be your response, be aware that the risk of expensive and time-consuming litigation at the NLRB is significant and the outcome is uncertain. If you lose, the NLRB could order you to reinstate discharged employees with full back-pay. That is true regardless of whether an employee gives you advance notice of his absence to attend the Rally. Of course, where plant or product safety is threatened due to a walkout, management is free to require continued attendance.

National Origin and Race Discrimination Issues. Title VII and state employment discrimination laws prohibit discrimination in employment based on national origin and race. Generally speaking, requiring compliance with existing call-in and attendance policies, and disciplining employees who violate these policies, should not raise discrimination

issues. However, employers should take care on Rally Day to enforce such policies in a manner that is consistent with past practices. For example, if you have allowed employees to take time off without penalty for Martin Luther King Jr. Day, or to leave early to celebrate St. Patrick's Day, selective policy enforcement against Hispanic employees who want to attend Rally Day may be discriminatory. It would likewise be troublesome to terminate Hispanic employees for a first offense for failure to call in on May 1, if in the past you have given non-Hispanic employees a warning for a first offense.

Immigration Reform and Control Act. The IRCA generally prohibits discrimination based on immigration status for employees legally authorized to work in the United States. It has an antiretaliation provision designed to protect employees who invoke rights under the Act. However, mere attendance at a rally, albeit one that protests the treatment of immigrants, does not implicate such rights.

Recommendations. Plan in advance for the event. To avoid unwanted negative publicity and reduce the likelihood of unplanned absences, we suggest that you openly communicate with your employees if you anticipate that they may want to attend Rally Day. Consistent with your existing time-off policies, ask your employees to inform you *in advance* if they plan to participate on May 1, so that they can request the appropriate time off (vacation day, personal day, PTO, excused unpaid absence), and so that you can staff to meet production needs that day. Most employees will readily comply. If you have a union and it contacts you to discuss releasing workers from work on Rally Day, try to work out a reasonable compromise that allows a limited number of employees to participate. Make sure management is on the same page—some of the recent bad press was generated because lower level supervisors apparently told employees they could have the day off without consulting with upper management. Confirm with employees who are taking May 1 off that they will return to work on the next scheduled workday.

Because some employees and interest groups will be looking for confrontation and public attention on Rally Day, conduct your planning in a businesslike manner, so that no one is given the excuse to cry foul.

If you have questions or concerns about these matters, please contact J. Kevin Hennessy (312-609-7868), Kenneth F. Sparks (312-609-7877), or any other Vedder Price attorney with whom you work.

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