



Will Your Workers Go On Strike On November 10? What You Need To Know

Insights

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Employee walkouts and protests are likely to occur on a massive scale across the country on Tuesday, November 10, spurred on by the union-supported “Fight for \$15” movement. Low-wage workers seeking higher pay and possible union status will be the primary participants, but don’t be fooled into thinking the protests will be limited to fast-food workers. It is expected that these protests will include workers across many sectors.

Given that we are now operating under a new legal model brought about by a significant recent NLRB decision, these protests could take on a character unseen by previous worker actions and lead to significant implications for your workplace. What do you need to know about the upcoming protests?

Brief History Of “Fast-Food Strikes”

Recent activity has sometimes been labeled as “fast-food strikes,” but that is somewhat of a misnomer. What started at a handful of fast-food restaurants has evolved to also include workers from childcare facilities, the home healthcare industry, airports, gas stations, convenience stores, retail stores, university settings (especially involving adjunct faculty professors), and other businesses. Companies at risk include those with low-wage workers, those with workers aiming for an increase in pay, or those seeking possible unionization.

The modern era of these strikes began in November 2012, when over 100 workers in fast-food positions walked off the job in New York City, considered to be the largest strike in the industry’s history. These actions were stimulated by the “Occupy Wall Street” movement, but organized in part by the SEIU union.

They spread throughout 2013, with dozens of similar protests and single-day strikes. By 2014, the movement had grown beyond the fast-food industry and included workers from other industries. The movement also included criminal behavior in the form of civil disobedience (such as sit-ins), leading to almost 500 arrests.

By 2015, the movement had coalesced into a fight for a \$15 minimum wage. On April 15, 2015, tens of thousands of low-wage workers across the country walked out of their jobs or joined protests in what has been called the largest such protest in our nation’s history. Workers now see another opportunity for a big impact with another round of protests before the end of the year.

What Can You Expect On November 10?

An even-larger protest and single-day strike is planned for Tuesday, November 10. The organizers of the “Fight for \$15” movement are calling for any worker who feels “tired of getting screwed by low pay” (their words, not ours) to walk off the job this coming Tuesday. Not surprisingly, the SEIU strongly supports this movement, seeing an opportunity to win back some relevancy in the conversation about the modern workplace.

The organization’s website, fightfor15.org, provides explicit instructions to workers telling them they should organize other workers and walk off the job (there are no instructions about seeking company approval or even providing advance notice to management who might be trying to staff shifts appropriately).

The workers are encouraged to publicize their actions, stand outside their place of work with protest signs, post content to social media sites, and chant, march, and sing. After the protests, of course, they are encouraged to take up the effort to form a union at their place of work.

What’s Changed Since Last Time?

Significantly, since the last round of protests, the National Labor Relations Board (NLRB) issued a controversial August 2015 joint-employer decision in the case of *Browning-Ferris Industries*. In that case, the Labor Board issued a broad new standard for determining whether two businesses are “joint employers” for purposes of collective bargaining and union organizing.

Even if a business just has the right to control certain aspects of the terms and conditions of another businesses’ workers, such as through a franchising arrangement or staffing company relationship, they could be considered a target of unionization efforts under the new system.

This could have dramatic implications, and the labor movement is eager to put this new decision to the test and use it to expand its dying influence over the American workforce. For example, if employees at a fast-food restaurant owned and run by a franchisee were successful in organizing a union, they could argue under this decision that they have the right to bargain with the corporate parent restaurant and not just the franchisee.

What Do You Need To Know?

In advance of widespread protest activity expected on Tuesday, November 10, we recommend you plan ahead. As part of your plan, you should understand that this is a highly technical area of the law involving subtle fact-sensitive distinctions between lawful and unlawful conduct, but with significant ramifications from a remedial standpoint. Add to the mix the fact that the body of law governing this field is in a constant state of flux and ever-evolving, and you have the potential for a highly combustible situation. For these reasons, we encourage you to consult labor counsel before embarking on any specific directives in this area.

Workers May Be Protected By Federal Law

First and foremost, you need to recognize that the National Labor Relations Act (NLRA) protects all

First and foremost, you need to recognize that the National Labor Relations Act (NLRA) protects all workers who engage in lawful concerted activity for the purposes of mutual aid and protection. This applies to unionized and non-unionized workforces alike.

Any worker who takes or seeks to initiate an action among a group of employees about work-related issues, or brings complaints about the workplace to management, is covered under the statute. Therefore, if you take adverse action against these workers for their concerted, protected activity, you could face an unfair labor practice charge.

You should **not** discipline workers for engaging in this concerted, protected activity. In fact, the unions and worker advocates may actually be eager for you to slip up and drop the disciplinary hammer on protestors, using your actions as an example to make workers into martyrs for their cause.

Earlier this week, in fact, the NLRB ruled that a St. Louis-area Chipotle restaurant violated the NLRA when it fired an employee who had participated in a 2013 low wage protest. According to the worker, his managers informed him that he “let the store down” for joining the rally, which the Board found to be sufficient evidence of anti-union animus, despite the restaurant claiming that it had terminated him for missing a mandatory meeting. The NLRB ordered the store to reinstate his employment and pay him back pay.

However, if your workers are already unionized, check your collective bargaining agreement about employee responsibilities with respect to protest activities. If you see a greater-than-usual spike in absences, or see blatant participation in protests, your contract may have no-strike and no-picket language that impacts your reaction to their behavior. Consult your labor counsel before proceeding further.

How To Handle Walkouts

While you have a legitimate interest in maintaining normal levels of productivity at work, and enforcing your attendance policies, you might have to give a pass to workers who violate your rules and walk out on the job. The NLRB will protect workers who engage in protected walk-outs but not necessarily those who are found to be participating in unlawful intermittent strikes.

There is a detailed analysis to conduct to determine whether worker activity during protests is protected or not, but one of the key factors the NLRB would look to is how often the protests reoccur. The more frequently your workers walk out, the more likely that their actions are considered unprotected. One-time protests are often deemed protected.

Train your managers to engage any workers who start to walk off the job without prior approval on Tuesday (preferably with a witness present), asking where they are going or whether they are leaving their job despite being scheduled to work. If they indicate they are protesting, offer them the option of discussing their concerns with management during a work break or at the end of their shift.

Make sure your managers know not to threaten discipline for anyone engaging in such a protest, or dock attendance points, if they instead decide to walk out. You can inform them that they will not be paid for the time they spend off the job, but you shouldn't force them to clock out if they continue to leave.

Employees don't have the right to stop working and simply stand in their work areas as a form of protest. You can require them to either return to work or leave the premises to conduct their protest. If they refuse to leave the premises despite repeated requests to leave the work area, you can call law enforcement but you should not discipline them for their protests.

Leafleting/Handbilling

Generally, workers handing out leaflets or handbills is an acceptable practice under the law. It is considered a protected form of speech, absent evidence of blatant vandalism, violence, trespass, or other unlawful behavior.

Bannerling

Protestors will often place a large banner nearby as another form of visible protest. This behavior is also largely protected by law, unless there is evidence of unlawful confrontational activity such as threatening customers or other employees.

Picketers

Protest participants who carry picket signs and stand or march in front of your business are subject to a greater degree of regulation; because picketing usually contains an element of confrontation or coercion, such conduct is typically seen as something more than just speech. Pickets cannot block entrances or exits, cannot commit overt acts of intimidation, cannot contain threats or violence, and cannot enter private property unless invited there.

Know Your Property Rights

In most states, third parties are not permitted to access your private property to engage in these protest activities. Even if you typically invite members of the public onto your premises to engage in business, they do not have the unfettered right to conduct protests there.

If you don't already know, you should determine your own state's property rights, ascertain where your property lines begin and end, and mark your property lines where appropriate. If protestors encroach on your property or block access to it, you can take legal steps to enforce your rights by calling the law enforcement authorities. You may also have the right to gain a civil court injunction against protestors by working with your legal counsel.

Know Your Limitations

There are certain actions you should generally not take without first having a discussion with your labor lawyer. You should not spy on protestors (even your employees) gathering in public spaces. This means you should not watch them, stare at them, photograph or video record their protests,

record the names of those protesting, or do anything else that suggests or implies they will be punished for their participation in the rally.

Social Media Conduct

The NLRB has consistently upheld an employee's right to complain about the workplace or organize protests on social media, so think twice and consult legal counsel before you discipline a worker for what they post on Facebook, Instagram, Twitter or elsewhere in light of the November 10 protests.

Illegal Conduct

If protestors enter company premises, somehow disrupt customer service, block entrances/exits, or interfere with your employees, you should first politely request them to leave and explain why (with a witness present). Do not raise your voice, and do not engage them physically. If they do not comply immediately, let them know you are calling the authorities, and then contact your local law enforcement agency to address the situation.

If you have any questions about this situation, or how it may affect your business, please contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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