



# What Employers Need To Know About The "Day Without Immigrants" Walkout

Insights

2.15.17

Employee walkouts and protests are anticipated across the country on Thursday, February 16, and Friday, February 17, as immigrants and others disappointed by the Trump administration's position with respect to immigration plan to stage a "Day Without Immigrants" protest. The activity, organized on social media by various worker advocacy organizations, ostensibly aims to demonstrate to the president (and others) the daily effect that immigrants have on the nation.

As part of the protest, advocates are calling upon immigrants to skip work or walk out in the middle of their shifts on one of these two days (different organizers have varied in their boycott dates). What should employers know about this planned activity, and what can they do about it?

## What Are The Protests And Are They Legally Protected?

As opposed to some recent national workplace boycotts – such as the rash of "Fight for 15" demonstrations that reached a crescendo in 2015 – the aim of this protest is apparently to send a generalized message of disapproval to President Trump and his administration. Some of the underlying boycott literature seeks a reversal of specific immigration-related policies, including construction of a southern border wall, the executive order on immigration and refugees, and recent deportation action taken against undocumented immigrants, while underscoring its message through the absence of immigrants in daily life (at school, at work, at retail establishments, etc.). Other literature goes further, protesting other Trump administration policies, such as the repeal of the Affordable Care Act, the construction of various oil pipelines, and other initiatives.

Beyond all that, there does not appear to be any unifying objective in mind, nor is there any identified connection to common workplace terms or conditions. While some may contend that their own protest activity is specifically aimed at the president's refugee travel ban – which *could* have workplace implications – this won't necessarily be true for every protestor or every employer.

In other words, the biggest distinction between these planned protests and the Fight for 15 protests that previously swept the nation is that no single work-related issue seems to be motivating the anticipated walkouts, which loosely revolve around broader political concerns. If there is no galvanizing message for workers to convey to management with their protest activity, a crucial distinction is revealed with respect to their legal rights.

That's because the National Labor Relations Act (NLRA) only protects workers (at both unionized and non-unionized companies alike) who engage in lawful concerted activity for purposes of mutual aid and protection. Consequently, the NLRA generally comes into play if and when a worker takes or seeks to initiate an action among a group of employees about *work-related issues*, or brings complaints *about the workplace* to management. Conversely, those employees who confine their acts of protest to broad-based government action bereft of any nexus to workplace concerns are generally not afforded such protection, as their actions are not considered concerted, protected activity for purposes of the statute.

The bottom line is that workers who stage a walkout or fail to show up for work may or may not be protected under the NLRA depending on their specific situation, and you need to examine the matter in more depth before making any decisions on how best to respond.

### **What Do You Need To Know?**

In advance of possible protest activity expected this week, 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 against the backdrop of an evolving regulatory landscape, and you have the potential for a challenging compliance situation. For these reasons, we encourage you to consult labor counsel before embarking on any specific directives in this area.

### **How To Handle Absences And Walkouts**

While you have a legitimate interest in maintaining normal levels of productivity at work, and enforcing your attendance policies, under certain circumstances you may have to refrain from disciplining workers who fail to attend work or walk out on the job. The NLRB will protect workers who engage in protected absences or walkouts, 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 National Labor Relations Board (NLRB) would look to is how often the protests reoccur. The more frequently your workers walk out, the more likely their actions are considered unprotected. One-time protests are often deemed protected, while the NLRB is less likely to condone additional bites at the apple.

The generalized nature of the Day Without Immigrants boycott literature and social media posts circulated thus far suggests that most of the protest activity, in and of itself, is unlikely to be deemed protected by the NLRA. The legal analysis in these cases, however, is necessarily contextual. Each employer's situation will be different, and each employee's articulated rationale for protesting could be as well.

For that reason, we recommend that you avoid drawing any preliminary conclusions based solely on the fact that an absence happens to coincide with a declared day of protest. Should employees refer

the fact that an absence happens to coincide with a declared day of protest. Should employees refer to the protest as a basis for their absence, however, you may want to provide them with an opportunity to explain the circumstances motivating their desire to take part before going further.

## **Absences**

If the employee simply says they missed work because of “protests,” that might not be a sufficient nexus for them to receive protection under the NLRA, and you are probably on safe grounds if you consistently apply your standard attendance policies in such an instance.

If the employee expressly indicates that the absence was tied to protests over working conditions, or if your workplace situation is such that the administration’s recent actions are particularly resonant (whether because of a large immigrant workforce, or because of specific individuals impacted by the refugee travel ban, or similar reasons), risk averse employers may want to give the benefit of the doubt and consider the absence as being protected under the law. This is particularly true in circumstances where the issuance of discipline would otherwise result in immediate discharge. If you proceed in that direction, make sure your managers know not to dock attendance points or otherwise discipline them for their absence.

## **Walkouts**

As for walkouts, instruct your managers to engage workers who start to walk off the job without prior approval (preferably with a witness present) to ask 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. If they refuse, follow the recommendations above by inquiring about the reason for their protest and consider the explanation provided and its connection to any employment terms or conditions before making your decision.

As with protected absences, if you conclude that a walkout is protected, make sure your managers know not to threaten your workers with discipline. You can inform them that they will not be paid for the time they spend off the job and can request they clock out before they leave, but you shouldn’t force them to clock out if they walk out anyway. As these often involve fact-sensitive determinations within an evolving legal landscape, employers are encouraged to seek the advice of counsel, particularly in response to the vast majority of fact patterns that are likely to be deemed close calls.

## **Unionized Work Settings**

If your workers are already unionized, check your collective bargaining agreement regarding 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.

## **Future Of The NLRB**

One factor to keep in mind when making the determination of whether to characterize employee activity as protected or unprotected is that the NLRB is beginning to tilt back to the right. The NLRB

appointments that will soon be made by the president will all but ensure that the Board majority will be comprised of members who are more sympathetic to management when it comes to interpreting the NLRA. Therefore, by the time any case arising from these protests reaches the final stages of administrative proceedings, we can safely predict that the Board will be more receptive to employer arguments than it has been for quite some time. While success cannot be guaranteed, this expected transformation is sure to provide comfort to those who end up being caught in the crosshairs of an unfair labor practice charge.

### **What Else Should Employers Keep In Mind?**

There are several other factors for employers to keep in mind about the expected protest activity.

#### **Slowdowns**

Some employees might not feel comfortable walking off the job or taking the day off, so they may elect to engage in a workplace slowdown. However, 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 should coordinate with your labor counsel to determine your best options.

#### **Leafleting/Handbilling**

Generally, handing out leaflets or handbills in non-working areas 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.

#### **Bannering**

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 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. Of course, this also underscores the importance of recognizing that state and local ordinances may also impact your rights and obligations in this area.

### **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 protests.

### **Illegal Conduct**

If protestors enter company premises, somehow disrupt customer service, block entrances or exits, or otherwise 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. In the age of smartphones with video recorders, it's best to avoid inviting a "Facebook moment" under these circumstances. 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.

### **Public Relations**

Finally, we have received reports that some businesses are proactively informing their employees that they are permitted to take time off work to engage in the Day Without Immigrants protest. Some of these employers may be guided by altruistic reasons, while others may be doing so just to avoid negative publicity. Depending on your specific circumstances, you may want to consider how your actions might be portrayed in your local media outlets before embarking on a specific path.

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

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*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.*

### **Related People**

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