

Insights, News & Events

IS THERE A WOMEN'S MARCH ON EMPLOYERS? WHAT EMPLOYERS NEED TO KNOW ABOUT THE 'DAY WITHOUT A WOMAN' PROTESTS

Insights
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After the Women's March on Washington earlier this year, organizers have now called for a worldwide protest to take place this Wednesday, March 8 – fittingly to take place on International Women's Day, a day historically known for protests advocating for gender equality. Those organizing the protest are encouraging women to take the day off from paid and unpaid work, avoid shopping for one day (with exceptions for small, women- and minority-owned businesses), and wear red in solidarity with A Day Without A Woman.

Notably, the organizers are encouraging all people to join in A Day Without A Woman, with male allies asked to show support in various ways. The organizers encourage men to take care of children and housework, or start conversations with decision makers in their workplaces about promoting family-friendly policies like paid leave or flexible scheduling.

What should employers know about this planned activity, and what can they do about it?

WHAT ARE THE PROTESTS AND ARE THEY LEGALLY PROTECTED?

Service Focus

Employment Discrimination and Harassment

Labor Relations

Pay Equity and Transparency

Similarly aligned with A Day Without Immigrants, which occurred earlier this year on February 16, employers can expect to see a large number of female employees out of work for the day. The protestors aim to show the impact on the economy if women's rights are not continued to be advanced, while sparking conversations in the workplace regarding gender equality. The protests also apparently include a generalized message of disapproval to President Trump and his administration.

Some of the underlying literature surrounding this event describes that the movement seeks to show "the vital role women play in both the domestic and global economy," which sounds like a very broad mission statement. However, it also aims to bring attention to "lower wages, sexual harassment, discrimination, and job insecurity" that women often face.

While it does not appear to be a protest with one unifying employment objective in mind, as we saw in 2015's protests and walkouts for a higher minimum wage dubbed "[the Fight for 15](#)," some may contend that their own protest activity is specifically aimed at gender inequality in the workplace, including leave laws, the desire for equal pay, and other issues typically impacting women.

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 workers take or seek to initiate an action among a group of employees about *work-related issues*, or bring 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 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 Wednesday, 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 Workplace Conversations

Because some employees who want to participate will not be able to call in and refuse to work for a day, you should prepare for increased conversation in the workplace regarding the protest and what it represents. Specifically, because male employees and women employees unable to take the day off work are encouraged to discuss with management workplace conditions including fair pay and leave programs, you must keep in mind that established labor law prevents you from prohibiting these conversations or firing an employee for discussing their concerns.

Workers who bring complaints about the workplace to management are covered under the NLRA, whether or not they are unionized. Therefore, if you take adverse

action against these workers for their concerted, protected activity, you could face an unfair labor practice charge. As a result, you should **not** discipline workers for engaging in such concerted, protected activity.

How To Handle Absences

We anticipate quite a number of absences tomorrow. In fact, the Women's March website is preparing protesters to not go into work by offering template letters to provide to employers, as well as an out-of-office message for employees to put on their work email accounts, announcing the reason for their absence.

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. The National Labor Relations Board (NLRB) will protect workers who engage in protected absences, 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 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 A Woman 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 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.

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, however, or if your workplace situation is such that the gender equality issues are particularly resonant, 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.

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.

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 posts 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 A Woman protest, and several have already announced closures. 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.

CONCLUSION

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

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.