



Will Employers Cry Mayday This May 1? What You Need To Know About Planned Protest Activities

Insights

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May Day has historically been a day marked by workers' rights protests, with union organizing activities and other employee advocacy actions taking place across the country on what is now known as "International Workers' Day." Spurred on by recent "Day Without Immigrants," "Day Without a Woman," and "Tax Day" protests, however, this year's version promises to be bigger than ever. Because your workers could take this opportunity to skip work or otherwise disrupt your operations, you should take the time to educate yourself about your legal obligations – and your rights – between now and next week.

What Will The Protests Look Like This Year?

Recent reports indicate that upwards of 350,000 workers plan to strike on May 1 in an effort to protest President Trump's policies, with many of them in the service industry. The protests will likely include those upset with the administration's current immigration stance, but may also include those pressing for greater worker rights. Local chapters of the Service Employees International Union (SEIU) have already indicated they will play a role in protest activity.

While the strike could conceivably impact just about any business, the employees most likely to miss work that day include janitors, security workers, airport staff, and food industry personnel.

Will Your Striking Workers Be Legally Protected?

Because there does not appear to be a singular unifying employment objective in mind with these planned protests, but instead a more generalized rebuke of the current administration, your workers have fewer legal protections. 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 those 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 or leave in the middle of the workday 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 the anticipated protest activity, 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, 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 them for their participation in concerted, protected activity, you could face a challenging unfair labor practice charge. As a result, you should not discipline workers for engaging in such activity.

How To Handle Absences

We anticipate quite a number of absences on May 1. In fact, several advocacy groups are preparing protesters to skip 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 standard 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.

The NLRB applies a detailed analysis to determine whether protest activity is protected, but one key factor is how often the protests reoccur. The more frequently your workers walk out, the more likely

their actions are considered unprotected. Consequently, 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 May Day 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 may not offer a sufficient nexus for them to obtain NLRA protection, and you are probably on safer ground if you consistently apply your standard attendance policies to 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 equality issues are particularly resonant, risk-averse employers may want to err on the side of treating the absence as protected under the law. This is particularly true under circumstances in which the issuance of discipline would otherwise result in immediate discharge. If you proceed in processing the absence under your attendance control program, 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, be sure to check your collective bargaining agreement for any employee responsibilities regarding protest activities, along with language in your no-strike clause. If you see a greater-than-usual spike in absences, or see blatant participation in protests, your contract may also have no-picket language that impacts your reaction to their behavior. Consult your labor counsel before proceeding further, who may want to contact the local union to discuss the no-strike clause prohibitions.

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 from a decidedly pro-union position to a more centrist philosophy, balancing the rights of both employees and employers. 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.

Public Relations

Finally, some businesses are proactively informing their employees that they are permitted to take time off work to engage in the May Day protest, and several have already announced closures. For example, Facebook announced on April 14 that it will not penalize employees who miss work on May 1, and will even re-evaluate business contracts with any companies employing staff who work on campus if they take punitive measures against striking workers. 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 authors at SBernstein@fisherphillips.com (813.769.7513) or TLyon@fisherphillips.com (503.205.8095), 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.

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