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With planned massive demonstrations on May 1 for immigration reform, many employers are wondering what their options are for dealing with employees absent from work. While there are no clear answers, several options are available.

The May 1 Immigration Demonstrations - What Can An Employer Do?

By Gavin Appleby, John Skonberg and James Ferber

On May 2, 2006, numerous newspapers will likely run the following headline: "Thousands Demonstrate over Immigration Issues." Of those thousands (predicted by the press to be hundreds of thousands across the United States), some may well be your employees. And those employees may have skipped work in order to demonstrate. Two questions then arise - can you, and should you, discipline those workers for missing work?

Employers that Fire Workers for Missing Work Due to a May 1st Demonstration Face Uncertain Legal Risk.

In most states, employees who demonstrate rather than work are probably not protected by law. The unfortunate word "probably" is part of the preceding sentence for at least four reasons: (1) the National Labor Relations Act (NLRA) prohibits retaliation against employees involved in protected, concerted activity; (2) some states recognize broad and sometimes ill-defined public policy exceptions against otherwise at-will discharges; (3) a number of states have specific statutes prohibiting discrimination or retaliation in connection with political activity; and (4) national origin discrimination claims may arise in these circumstances.

Evaluating these potential legal problems, the NLRA's prohibition against protected, concerted activity would not appear to apply to immigration-related demonstrations. Such demonstrations do not seem to involve a term or condition of work, which is a requirement of the law. Further, employers are generally permitted to discipline employees who violate a legitimate attendance policy. Therefore, an NLRB charge based on protected, concerted activity is questionable, although the NLRB's actions can be difficult to predict. Moreover, employers should be aware that, in a case arising in a somewhat different context (with no absence issues), the NLRB in *Kaiser Engineers*, 213 NLRB 752 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976), found that employees expressing written concerns to their elected representatives about potentially losing their jobs due to immigrant workers were addressing a term or condition of work. In addition, the Supreme Court more broadly has determined that at least some employee political action is protected under the NLRA. *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978).

Discipline for skipping work also should not constitute a violation of a state's public policy. However, in some states such as California and Ohio, "public policy" can be a broad and uncertain concept. Consequently, some risk arises, especially for discharge, in at least a few states. That is particularly true in jurisdictions like California, where the

state legislature has passed a statute prohibiting discrimination or retaliation against an employee who has participated in political activity. Cal. Lab. Code §§ 1101-1102. In general, such antidiscrimination statutes were intended to prevent post-political election retaliation. However, there is a meaningful possibility that California's Department of Industrial Relations (and perhaps other state departments of labor) would interpret the law to protect an employee who informs his or her employer in advance that he or she intends to miss work in order to demonstrate for a political cause (as opposed to simply not showing up for work). In fact, the California Labor Commissioner took that very position several years ago in an unreported decision based on similar facts.

Finally, to the extent that a company wishes to discharge a demonstrating employee for missing work, the employer should consider how it has treated the absences of other workers. If absences have been taken by other employees for "mental health days" or even "to just go fishing," and discipline follows only if that particular occurrence puts the employee at an "impermissible attendance level," the same may need to be true for employees who have attended immigration-related demonstrations. In fact, because many of the participants in the demonstrations may be minorities, employers should be prepared to demonstrate that their attendance policies have been evenly applied to all employees, and that the policies do not have an adverse impact on minorities.

So What's Your Strategy?

The recent immigration demonstrations have created a wide divergence of employer responses. Those responses range from "we have a business to operate and employees off for non-legitimate reasons should be fired" to "we empathize with and need immigrant workers and we want to show our support." Candidly, there is no clearly correct employer response. Employers legitimately do have a business to run, but many companies also recognize their own needs for immigrant employees and have sympathy for such workers.

Employers that wish to take a strong disciplinary approach should evaluate the legal issues noted above and determine whether discharges are likely to create legal problems. Such employers also may wish to consider threats by unions and immigrant groups to picket, boycott and direct union campaigns at "non-supportive employers." At the same time, employees who do not inform their employers that they intend to be off on May 1 (but then skip work to demonstrate) leave such employers high and dry.

In light of these difficult circumstances, employers may wish to consider one of the following three options:

1. Tell employees that they will not be disciplined if they inform the employer in advance that they will not be at work on May 1, but they will be disciplined and possibly discharged if they skip work that day without notice (and without a doctor's excuse). Further, unless employees have "paid time off" from a vacation or other benefit bank, they will not be paid for that day even if they avoid discipline.
2. Inform employees that while the company appreciates the employees' views on immigration issues and while the workers have the right to participate in related events outside of work hours, employees are expected to be at work on May 1st. Consequently, unexcused absences on that day may result in discipline, up to and including discharge. Employers taking this position, however, should carefully evaluate the legal risks outlined above.
3. Tell employees that the company supports assistance to immigrant workers, but that the company is operating on May 1st and work needs to be done. Some companies, in conjunction with this approach, are sponsoring lunch sessions to "eat and learn" about immigrant issues, in an effort to provide a means other than off-work demonstrations to address the concerns of immigrant workers. Such companies are likely to discipline employees only if an unexcused absence on May 1 puts the employee at an impermissible level of attendance.

Corporate needs and corporate cultures vary as do corporations' dependence upon immigrant workers. In an effort to avoid unnecessary discharges, poor morale and a host of other problems, we strongly recommend that you communicate with your workers about employer needs, employer expectations, the importance of both the immigration issue and the employer's ability to run its business, and any other strategies or concerns that you have *prior to May 1st.* Remember - no one should ever be surprised to be fired and good replacement workers are getting harder and harder to find.

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