ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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Some activist groups have repeated the call for a national day of action for immigrants' rights on May 1. To provide guidance to employers in addressing employee absences, we have updated and re-issued our 2006 ASAP "May 1 Immigration Demonstrations – What Can an Employer Do?"

Labor Management A Littler Mendelson Newsletter

Same Time This Year: The May 1 Immigration Demonstrations – What Can an Employer Do?

By Andrew P. Marks and Gavin S. Appleby

At this time last year, many employers were preparing for a threatened widespread walkout of employees supporting immigrant rights. Some activist groups have repeated the call for a national day of action for immigrants' rights and anticipate more than one million participants in this year's rallies. Indeed, employees who were afraid to participate last year may feel empowered after observing few material consequences imposed on last years' demonstrators.

We advised last year that employers that fired or disciplined workers for missing work to join the May Day demonstration faced uncertain legal risks. We noted then, and reiterate now, that the safest approach is to promulgate and enforce reasonable attendance policies in a non-discriminatory manner. What have we learned over the last year?

As predicted, participation in an immigrant rally has not enjoyed the protection of the National Labor Relations Act. The National Labor Relations Board (NLRB) decided to have the Division of Advice review all unfair labor practice allegations stemming from the rallies. In several charges, the Office of the General Counsel assumed that participation in or support for the demonstrations was protected activity, but still dismissed charges because the employee failed to advise the employer of his/her absence. "Even assuming, without deciding, that the employees' attendance at or support for the demonstrations would have been conduct protected by the 'mutual aid or protection' clause of Section 7, their missing work to participate in Section 7 activity is not protected." In one case, the employer had implemented a new rule to combat the anticipated absences on May 1, specifically that no-call/no-shows would be grounds for immediate discharge and employees calling in sick on the day of the demonstrations would need a doctor's note. The announcement of the new rule was lawful "because it was intended to address only the economic impact that a mass absence would likely have on the Employer's operations; it was not a reaction to the nature of the employees' activity, i.e., the arguably protected subject matter of the demonstrations." (*Calmex, Inc.*, Case No. 32-CA-22651 Advice Mem. (Nov. 30, 2006).)

One Advice Memorandum goes further, concluding that participation in the rally was not protected:

> The employee's unexcused absence, even if intended to lend support to the protected subject matter of a 'Day Without Immigrants' protest, would not have been protected because the Employer has no control over the legislation that was the subject of the protest. The employee was not engaged in any protest against the Employer, nor was she attacking the Employer's position regarding immigration policy. The employee was protesting legislation in the U.S. Congress. There is nothing the Employer could have done, nor was there anything the employee asked the Employer to do, that would have resolved those issues or concerns. A strike to achieve this political aim would exert the same kind of pressure on the Employer as a secondary strike would exert on a neutral employer. (*Reliable Maintenance*, Case No. 18-CA-18119 Advice Mem. Oct. 31, 2006).

Last year's rallies do not appear to have spawned many state law statutory or wrongful discharge claims. Nor does there appear to have been a significant increase in federal discrimination claims, although it may be too early to reach a firm conclusion based on the absence of reported decisions. Nevertheless, it is prudent to continue following basic principles of fairness.

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.

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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