

Employee Walkout? Work It Out

Quite a few news reports discuss recent employee walkouts across the country in protest of new federal policies, such as the recent “Day Without Immigrants” protests.

Employers are obviously concerned about how these protests might affect their business operations and what they should do. In some news reports, employers showed support for employees who choose to protest. But in other reports, employers found that the protest activity was cause for disciplinary action.

The situation can be tough to navigate.

If an employee doesn't show up at all or walks out in the middle of a shift, this will certainly create a mess for employers, the customers they are trying to serve and the work that needs to get done. Employers want to be able to ensure productivity and maintain attendance policies.

Despite these legitimate concerns, employers should exercise caution before taking disciplinary action against an employee who fails to show up to work because of a protest. In some, but not all, circumstances, the employee's behavior may be legally protected.

If you have concerns that employee walkouts will disrupt your ability to operate, the best course of action is to seek advice of counsel.

Possible Protections

The National Labor Relations Act (NLRA) protects the rights of employees to engage in “protected concerted activity,” which the National Labor Relations Board (NLRB) generally defines as two or more employees taking action relating to terms and conditions of employment for their mutual aid or protection (Sections 7, 8(a)(1)).

This right applies to both union **and** nonunion employees. In fact, the NLRB often enforces this right in nonunionized settings.

In some circumstances, when employees get together to specifically protest working conditions or job issues, such as wages, the NLRA protects those activities. For example, we saw workers protesting in 2015 for a higher minimum wage. Since this activity was related to improving the employees' working conditions, it may be entitled to protection under the NLRA.

In other circumstances, the question is more difficult. For example, if workers walk off the job to participate in a general rally opposing the current administration, it is less likely that they are organizing together to try and improve their working conditions. In this situation, NLRA protections might not apply to

the employees' behavior.

It's not going to be easy for an employer to make a split-second decision as to whether the workers' activity is protected or not. Recent walkouts involved federal immigration policy and enforcement measures. Both of these can affect workplace conditions, especially if your business employs a large number of immigrants. But not all the protests zeroed in on a specific issue of improving workplace conditions.

Given the difficulty of determining whether the activity is protected, caution on the employer's part and consultation with counsel is warranted before taking any disciplinary action. Each boycott may be different, and, thus, employee participation may or may not be protected. Also, blanket statements that the employees cannot participate without jeopardizing their jobs may not pass legal muster.

Unfortunately, this area involves a detailed analysis.

Loss of Protections

Keep in mind that employees can lose any protections they are entitled to. For instance, if employees engage in certain acts of misconduct, the NLRA will not protect them. Examples could include planning the destruction of property or threatening or engaging in violence.

If the walkouts are not isolated occurrences but are, instead, reoccurring, employees may also lose protection. Under current law, workers who strike multiple times, especially in the same labor dispute, can lose the NLRA's protections and face discipline or termination. The NLRB, *in some situations*, has found that intermittent strikes are not protected.

Slowdowns, where the workers stay at work but don't do anything, may also be unprotected.

Immigration Protections

California provides several protections against [immigration-related discrimination and retaliation](#), laws that are stronger than even federal protections. These laws may come into play with the protests or walkouts.

Under California law, all individuals, regardless of immigration status, who applied for employment or who were employed in the state are entitled to all protections, rights and remedies available under state law, except any reinstatement remedy prohibited by federal law.

This includes state labor, employment, civil-rights and employee-housing laws. You cannot inquire about a person's immigration status except when necessary by clear and convincing evidence to comply with federal immigration law. These laws are found in several overlapping California statutes (Civ. Code sec. 3339; Lab. Code sec. 1171.5; Health and Safety Code sec. 24000; Govt. Code sec. 7285).

California also has strong protections for immigrant workers who complain about unfair wages or working

conditions (Labor Code sec. 1019). For instance, an employer may not threaten to contact, or contact, immigration authorities because an employee complained that he/she was paid less than the minimum wage.

Critically, it's unlawful in California to report or threaten to report the suspected citizenship or immigration status of an employee, former employee, prospective employee *or a member of the employee's family* because that person exercised a right under the Labor Code, Government Code or Civil Code. This is a broader protection than just protecting complaints about wages and hours; it also covers other rights, such as bringing a discrimination or harassment complaint under the Government Code.

In addition:

- Business and Professions Code section 494.6 permits the state to suspend or revoke an employer's business license where the employer makes a report or threatens to report suspected immigration status in violation of Labor Code section 244.
- Penal Code section 519 provides that a person may be guilty of criminal extortion if the person threatens to report the immigration status or suspected immigration status of an individual, or his/her relative or a member of his/her family.

Both California and federal laws also protect workers from discrimination on the basis of national origin.

Off-Duty Conduct

Remember that California law protects employees for engaging in lawful conduct during nonworking hours. So if the employees engage in protests outside working hours, leave it be. Labor Code section 96(k) allows employees to bring claims for lost wages when they are disciplined or discharged for lawful conduct during nonworking hours.

California's Labor Code section 1101 prohibits employers from adopting or enforcing any rule, regulation or policy that:

- Forbids or prevents employees from engaging or participating in politics or from becoming candidates for public office.
- Controls or directs, or tends to control or direct the political activities or affiliations of employees.

Best Practices

If you are affected by walkout activity, keep the following in mind:

- Plan ahead if you know that employees are going to engage in walkouts.
 - Deal with staffing issues.
 - Consider talking to your workers to allow them to explain why they are planning to participate

in the walkout.

- Consult legal counsel about the appropriate course of action.
- Don't automatically take disciplinary action or threaten disciplinary action without legal consultation.
- Make sure that company policies are job-related and applied consistently and fairly.
- Remember that your employees' [social media activities](#) may also be protected.
- Train managers and supervisors to be mindful of employee protection issues.

What do immigrant protections mean in relation to recent walkouts or boycotts?

- Employers should not assume that an employee who protests is undocumented.
- Employers should never ask employees to reverify their eligibility to work (by completing a new *Form I-9*) simply because the employees are involved in political activity relating to immigration issues or because the employer is now suspicious that the employee is undocumented. The *Form I-9* should have been completed at the time of hire.
- Supervisors and managers should understand that using, or threatening to use, the suspected immigration status of an employee or employee's family member because that employee is exercising protected rights is unlawful conduct.