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Q and A about employee "political protest" strikes

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We reported yesterday on the immigrant strikes expected nationwide today and tomorrow, and whether the strikers are protected under the National Labor Relations Act. Here is a more in-depth look at the issue.

Q-This week we've had immigrant strikes, and there has been talk recently about a "Day Without a Woman" strike that might take place next month. What recourse does an employer have? Would a strike like this be "protected concerted activity," which means that the employer might not be able to take action against a participant?

A-It depends. The National Labor Relations Act defines protected concerted activity as any action taken by two or more employees for the mutual aid and protection of workers (or action taken by one employee on behalf of other employees). Protected actions must somehow relate to the terms and conditions of their employment. Practically, this can mean discussing their wages or working conditions, bringing complaints to management's attention, or taking part in organizing activities. It can also mean airing their grievances publicly — for example, by posting negative information about their employer online, engaging in a strike, or speaking to news organizations.

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As a corollary, while the Act gives the employees these rights, it also generally restricts employers from taking any disciplinary action against employees for exercising them. Thus, when an employer restrains an employee from engaging in protected concerted activity with discipline or threat of discipline, it generally commits an unfair labor practice unless the right to engage in the activity has been waived, for example, by a no-strike provision in a collective bargaining agreement.

So, although the general rule is that employers cannot discipline employees for exercising their rights under the NLRA, when it comes to something like this — a strike that may be more of a political statement than a disagreement with a particular employer's policies or actions — the line between "protected concerted activity" and "political activity" becomes blurred.

Q-Would the strike's "protected" nature depend on what exactly the strike was about? For example, if the women were marching for pay equity or for

better contraceptive coverage under employer health care plans, might that be protected? As opposed to, say, "Trump is not my president"?

A - It could, but that's really only the first step. In 2008, the National Labor Relations Board's Office of the General Counsel issued a **Guideline Memorandum** in response to widespread immigration demonstrations that occurred around 2006. In that memo, the General Counsel noted that the influx of cases had required the agency to review its approach to "political advocacy cases," and to create a framework for considering such cases in the future.

Ultimately, the memorandum recommends a two-step inquiry – first, whether the advocacy falls within the "for mutual aid and protection" clause of the Act; and, second, whether the particular activity is protected.

With respect to the first part of the analysis, the memorandum notes the question is "whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." Applying that test to the immigration demonstrations in 2006, the GC concluded that those activities were, in fact, for the mutual aid and protection of workers. The stated concerns of the protesters included job protection for immigrant workers, and this qualified as a work-related concern in the view of the GC, and so the "advocacy" requirement was satisfied.

So, the specific issues cited by the strikers today could certainly play a role in whether the activity could reasonably be seen as being engaged in for mutual aid and protection. Using the example of pay equity in the workplace and contraceptive coverage under employer health plans, it looks like that portion of the inquiry would be satisfied.

But again – that's only the first step. Just because a concern may fall under the "mutual aid and protection" clause doesn't mean that *any* activity taken in support of that advocacy is necessarily protected. The NLRA offers significant protection for actions that occur on non-working time in non-work areas; generally, employers cannot discipline employees for that type of activity. It's a different story, though, when the activity in question is leaving or stopping work in order to participate in political advocacy.

The General Counsel Memorandum recognizes that a strike is an economic weapon, the aim of which is to force an employer to change a policy or practice that is within the employer's control. With matters of political advocacy — for example, immigration reform, or *legislation* relating to equal pay or healthcare, or "Trump is not my president" — the employer probably lacks the ability to change the outcome. And, because these are matters outside of the employer's control, this generally means that an employer is entitled to apply its lawful work rules, including rules against leaving work without approval, or violating an attendance policy — so long as it applies the rules in a neutral manner.

So, even if the advocacy itself is protected, the activity may not be.

Q-If an employee wanted to take the day off work to participate in the strike and gave the employer reasonable notice, and maybe even had Paid Time Off or vacation time available, should the employer let the employee take the day off for that purpose? Even if the employer disapproves of the idea of a "strike"?

A-If the employer would normally allow an employee to take the day off under its policy, then it would in all likelihood need to allow it for the strike, as well. Otherwise, the employer runs the risk of being accused of discriminatorily applying its policies and procedures, in a direct effort to prevent an employee from engaging in protected concerted activity.

Q-Does it make any difference if the employee taking the day off (either with or without notice) is a member

of management, as opposed to a non-management employee?

A-The NLRA applies only to non-supervisory employees, and accordingly, supervisors (and managers) are not entitled to the Act's protections. That being said, however, employers will have to consider their own workforces in deciding whether to grant supervisors' and managers' requests for time off to strike, and determine the costs of acquiescence or refusal – from both a legal and employee relations standpoint.

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