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CLIENT ALERT

THE RISKS OF DISCIPLINING EMPLOYEES ABSENT FROM WORK FOR POLITICAL ACTIVISM

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Thus far, 2017 has seen a virtually unprecedented level of civic engagement by huge swaths of the American population. A number of marches and protests have already taken place, including the record-breaking Women's March on January 21, 2017, and the national "Day without Immigrants" on February 16, 2017. The national "Day without A Woman," and the upcoming tech sector walkout planned for "Pi Day" (March 14, 2017) present interesting challenges for employers. Employers may have questions about how to limit the effect of these future political demonstrations on their workplaces: What if employees call out? Can employers refuse employees a day off to "strike" for political purposes? Can employers discipline and/or fire employees for taking the day off? If not, can the absence still count as unexcused? While it is acceptable in some cases to discipline and/or terminate an employee who was absent to engage in political activity, there is one significant caveat that employers must be aware of: the National Labor Relations Act (NLRA).

First, the First Amendment.

When employers take action in response to something an employee has said, they frequently get backlash that they can't discipline employee speech, because doing so infringes on employees' First Amendment rights. This popular response demonstrates how widespread the misunderstanding of the First Amendment is. But what is popular is not always right, as is the case here. The First Amendment applies *only* to the federal government and other public employers, such as state and local governments and agencies. It does *not* limit a private employer's right to enforce internal policies, or to discipline or terminate an employee for speech that violates such policies or that is otherwise objectively inappropriate or offensive. Thus, a private employer's rule prohibiting employees from "talking politics" during working time is not a violation of the First Amendment.

Some Political Activity is Protected

The NLRA applies to both union and non-union employers and gives employees the right to engage in "concerted activities" for purposes of their "mutual aid or protection." It is an unfair labor practice for an employer to interfere with employees' exercise of these rights. Courts, as well as the National Labor Relations Board (NLRB), interpret "concerted protected activity" very broadly, and the U.S. Supreme Court has held that concerted activity to improve working conditions can be protected even if it occurs outside the

context of the employment relationship. Thus, political activity that is related to improving employees' working conditions will generally be protected. Similarly, the NLRB has taken the position that employees have a right to engage in political activity when there is a "direct nexus" between the purpose of the political activity and a specific employment-related concern. So a worker striking as part of the "Fight for $15" movement to advocate for a $15 per hour wage is engaging in protected, concerted activity, while an employee refusing to work as part of the national Day Without Immigrants, the goal of which was to protest President Trump's immigration agenda, may not have been engaged in protected activity, because it's not clear that this protest had a "direct nexus" to any specific employment-related concern.

The caveat to this rule is that employees who leave work to participate in political activity, even when the activity is related to an employment-related concern, will not be protected if their employer has no control over the issue being protested. This is because the NLRA protects employers from "economic coercion," such as strikes, related to issues outside the employer's control. Moreover, even when employees are engaged in protected activity, they may still be required to follow lawful and neutrally-applied work rules, such as a requirement that employees notify their supervisor if they will be absent from work. In other words, just because an employee was absent due to protected political activity doesn't the employee can't be disciplined for a "no call no show" or for other uniformly-enforced attendance rules.

To Discipline or Not to Discipline

While disciplining employees for something like a no call no show may be an easy call, disciplining for absences is a more difficult question. First, employers cannot discriminate against employees for engaging in protected activity, so an employee who takes time off from work to engage in protected activity must be treated the same as an employee who takes time off from work for any other reason. But even when politically-related absences are not protected, there are a number of other considerations employers should take into account before deciding to discipline for those absences.

Employers tempted to fire employees who skipped work to protest should consider the practicality, costs, and implications – including the impact on morale – of firing a potentially large segment of their workforce for engaging in a single day of political protest. Employers should also consider the potential for negative publicity resulting from mass terminations, and the opportunity for positive publicity if the employer decides to support protesting employees.

In addition, even if employers think certain political activity is unprotected, employees, or the NLRB, may disagree. Even where a protest may seem more general in nature, employees may be able to establish a protected reason for participation. For

example, an employer may believe yesterday's "Day Without a Woman" was centered around general human rights for women, but an employee may argue that the protest included action taken to improve working conditions by fighting for equal pay or an end to discrimination and harassment in the workplace. There may also be a risk of discrimination claims if discipline is issued exclusively to a group sharing a common protected characteristic, such as sex, gender identity, or gender expression (Day Without a Woman), or national origin, race, or ethnicity (Day Without Immigrants).

Because of the numerous legal risks in terminating and/or issuing discipline to these employees, many employment law experts recommend that employers "eat" these absences and refrain from issuing any form of discipline. If discipline is imposed, the employer should make clear that the discipline is for violating a uniformly-enforced work rule (such as failing to report an absence, or exceeding an acceptable number of unexcused absences) and not due to the fact they were absent to engage in political activity. Ultimately, how an employer chooses to handle these absences will depend largely on the facts of each individual case and the amount of risk the employer will tolerate. Before taking action, be sure to discuss your options with an experienced labor attorney in your area.

No Matter What, Be Sure To Do This

All employers should be sure they have policies in place that explain attendance requirements and the procedure for handling unscheduled absences. Depending on the industry, employers may also wish to have a policy addressing a mass call-out or other collective action, as well as acts of political advocacy. Because certain political activism may be protected by the NLRA, employers should proceed cautiously when drafting these policies and seek the advice of experienced labor counsel.