

MANAGEMENT ALERT

April 25, 2006

Preparing for and Responding to Absences Relating to the Nationwide Immigration Protest Scheduled for May 1st

On April 10th, as many as 2 million individuals gathered in cities, streets and parks for a National Day of Action Rally for Immigrant Rights in support of comprehensive immigration reform. Organizers of the protest on April 10 directed supporters of the rally not to go to work, not to patronize businesses such as movie theaters, restaurants and stores and not to buy gasoline or other consumer products. The purpose of the event was to show solidarity among Hispanics - citizens and non-citizens - across the country who support immigration reform to protect the approximately 11 million undocumented immigrants residing in the United States. Individuals in over 75 cities participated in this national rally. The April 10 national protest followed similar protests that took place in March 2006 in numerous locales across the country, involving hundreds of thousands of participants, with the largest such protest involving over 500,000 participants in Los Angeles on March 25.

On May 1, a similar national immigration rally, protest and boycott of work for Hispanic workers, entitled "A Day Without An Immigrant," is expected to take place. As a result, employers may face a complete boycott of work by their Hispanic workforce. Anticipating, preparing for and responding to these absences raises significant practical issues and potential legal issues under the National Labor Relations Act and Equal Employment Opportunity laws.

Under the National Labor Relations Act, employees have the right to engage in concerted activities for their "mutual aid and protection." In order for concerted activity to be for "mutual aid or protection," and hence, constitute protected activity, it must bear a sufficiently close relationship to the employees' interests as employees. While protests that are *purely* political in nature do not constitute protected concerted activity, the National Labor Relations Board ("NLRB") and the federal courts have found some political activities protected where the participants expressed concerns that legislation or governmental activity would impact their job security, wages or other working conditions. For example, in *Kaiser Engineers v. NLRB* (1976), the Ninth Circuit enforced the NLRB's finding that employees who had engaged in protesting immigration law changes were engaged in protected activity where the employees claimed that their protest was to protect their job security which they believed the changes threatened, and thus, bore a sufficiently close relationship to their interests as employees and prohibited the employer from subjecting them to discipline for engaging in such activity.

Although the organizers for the May 1 protest have yet to articulate how the immigration legislation is sufficiently connected to employees' interests as employees (as opposed to their interests as immigrants), should a sufficiently close relationship be shown, engaging in the protest could be construed as protected concerted activity under the National Labor Relations Act, prohibiting employers from threatening to discipline or actually disciplining employees for participating in the boycott. In fact, charges have already been filed with various administrative agencies across the country against employers who disciplined or discharged employees for

participating in the April 10 protest, including charges filed by two former restaurant workers in Milwaukee who filed charges with the NLRB alleging that their terminations after they participated in the April 10 boycott violated that National Labor Relations Act because they were engaged in efforts to assist in the mutual aid and protection of themselves and other immigrant workers. It remains to be seen what will become of these charges.

Moreover, under federal and state Equal Employment Opportunity laws, employers are prohibited from discriminating against employees on the basis of their race, national origin and citizenship status, among other factors. Taking or threatening to take disciplinary action against individuals who participate in the May 1 protest could be a violation of EEO laws, especially if employers treat these employees differently from others who do not report to work or call off work on other occasions or under other similar circumstances.

In addition to the legal risks, employers should also bear in mind the negative public perception that could result from an aggressive response to employees who participate, or express a desire to participate, in the May 1 protest. Such employers could easily appear insensitive to immigrants if they take action against them for engaging in such protests. Moreover, from a practical standpoint, many employers with large numbers of immigrant employees may not be able to discharge all of the employees who engage in such protests and still continue to operate their businesses. There are, however, steps that employers can take to minimize the disruption caused to their workplaces by the events of May 1.

What Can Employers Do?

1. **Communicate with your employees in advance of May 1.**

Employers can, and should, develop and communicate their position to employees on the rally and employees' expected attendance at work in advance of May 1. If your company supports immigration reform, you should advise employees that the employees' dispute should not be with the company and explain any measures that your company is taking in support of immigration reform. If your company is opposed to immigration reform or has not taken a public position on this issue, your communication can advise employees that the employer understands the issue, respects the employees' opinion on the issue and applauds the efforts going on in the political process.

If your company intends to operate on May 1 (you always have the option not to operate if you fear widespread absenteeism due to the protest activities), the communication should also explain that the company has customer commitments that must be honored and that it expects employees to come to work. The communication should inform employees how important their attendance is to fulfilling these customer commitments, how much they are valued, and thank them, in advance, for their efforts and for honoring their commitment to come to work on May 1.

2. **Encourage your employees to come to work.**

In an effort to encourage employees to come to work, employers may want to plan a special event designed to increase attendance on Monday, May 1. For example, employers may announce their intentions to provide employees with breakfast, lunch or plan activities, such as a

raffle, which will motivate employees to come to work on Monday. Furthermore, if such is possible under the employer's policies and state and federal wage and hour laws, the employer might extend its lunch or break periods to allow employees to watch coverage of the rallies on a company-provided television during their peak times. The employer might also offer food and drink to employees during this "TV" time in the spirit of supporting the effort.

3. Offer employees alternative ways to show their support for immigration reform on May 1 while honoring their obligation to come to work.

Employers might also advise employees that they can effectively express their views by writing, calling or emailing their United States Senators and Representatives. Employers can offer to assist employees in these efforts by providing employees with the names, addresses and other contact information for these officials, by helping with the preparation of form letters to these officials, by allowing for the use of company equipment to prepare or send such letters, or even providing postage for such letters.

Employers should also communicate to employees that they do not need to miss work on Monday in order to show their support for immigration reform. Indeed, while organizers of the boycott such as the League of United Latin American Citizens (LULAC), are calling on individuals to refrain from purchasing consumer products on May 1, in an April 18, 2006 press release, LULAC indicated that it did not want individuals to miss work without permission from their employers. Instead of missing work, organizers of the boycott are suggesting that protesters could show their support by attending events, such as marches, vigils or voter registration drives before or after work or during lunch and break times. Employers would be wise to check their community calendars for such events and advise their employees of these events. Other organizers are suggesting that individuals can show their support by wearing white ribbons and American flag pins or posting placards bearing the phrase "In God We Trust" on their vehicles, and outside of their homes, business and work sites.

4. Remind employees of your attendance policies.

Employers should reiterate their attendance policies, reminding employees of the consequences for failure to report to work, the proper procedures for calling off work, the expectations of employees who return to work after failing to report to work as scheduled, and encouraging employees to follow any procedures for pre-approved time-off, if available. In this communication (which should be in English and Spanish, as well as any other language which the employer normally uses to communicate with its employees), the employer should explain that it is respectful of employees' opinions, but that it is encouraging employees to come to work on May 1.

If consistent with its policies, an employer may also tell employees that the company supports the effort, but that it will authorize only a specified number of people to be absent on May 1 to attend the rallies and "represent" the company and its employees in these efforts. Who can attend will need to be decided by whatever method is generally used by the employer to grant time off when several people request the same time off, such as on the basis of seniority, time of request, or other such procedures.

Employers should also advise employees that the company will otherwise enforce its attendance policies and procedures for May 1 and provide employees with additional copies of such policies so that there is no question that the employees understand what those policies are.

5. Follow your usual attendance policies on May 1.

Should absences occur on May 1 due to the immigration protest, employers should follow their attendance policies – whatever those may be. Employers should treat these absences the way they would any other, excused or unexcused. For example, to the extent your policy provides that management can limit the number of vacation and personal days granted at any one time, your managers can do so. To the extent your policy requires employees to “call off” in advance of absences or to provide doctors’ notes for single day absences, you can enforce this requirement as long as it is consistent with your normal practice. If employees are normally allowed to use accrued vacation or sick days in order to be paid for days on which they are absent, follow your regular policy. To avoid any allegations of discrimination, employers should not treat employees any differently on this day than on any other day in which they are absent from work.

6. Be prepared to operate on Monday, May 1 with a reduced work force or not to operate at all.

Employers should be prepared to operate on May 1 with whatever skeletal crews that may be available. There is no accurate way to predict how many people will actually be absent, and there likely are many who will just use the rally as an excuse to take the day off. So, employers should be prepared to respond to all of these possibilities.

For additional guidance concerning preparing for or responding to absences relating to the immigration protest scheduled for May 1, please contact any of the attorneys listed below.

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