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Labor and Employment Alert: 'A Day Without a Woman' May Bring Employers a Day Of Legal Troubles

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CLIENT ALERT | 3.6.2017

This year has already witnessed two large-scale political protests – the Women’s March on January 21 and “A Day Without Immigrants” on February 17. Now, the organizers of the Women’s March have set March 8 as “A Day Without a Woman.” According to the organizers, the day is intended to draw attention to issues affecting women and mothers such as paid family leave, sick days, fair pay, vacation time, healthy work environments and health care. They are calling upon women to cease paid and unpaid work for that day. This raises the question of what to do with employees who leave or absent themselves from work to participate in A Day Without a Woman. Can these employees be disciplined for engaging in this political advocacy or are their absences somehow protected by law?

The National Labor Relations Act and political advocacy

Generally, at-will, private-sector employees are not protected by the First Amendment and can be terminated for engaging in political expression. However, the National Labor Relations Act (NLRA) may protect employees who do so, regardless of whether the employees are members of a union. The National Labor Relations Board (NLRB) takes a broad view of both union and non-union employees’ right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Employees are protected from retaliation when they seek to improve their working conditions by appealing to legislators to protect their interests as employees.

This is not the first time employers have faced employee walkouts over political advocacy. In 2006, the NLRB considered a series of unfair labor charges involving employees disciplined for participating in demonstrations against legislative proposals that would have imposed greater restrictions and penalties on immigrant employees and their employers. Protesting employees believed that employers would decline to hire immigrant employees rather than risk violating the proposed law, which could directly affect their job opportunities, job security, and other interests as employees. Consequently, the NLRB

found that such employee participation fell within the NLRA's "mutual aid or protection" clause.

In 2013, some Walmart employees traveled to its Arkansas headquarters protesting inadequate wages in what was known as the "Ride for Respect." Several employees were fired as a result, with Walmart contending that their unexcused absences amount to "intermittent work stoppages" that are unprotected by the NLRA. In 2016, an NLRB judge disagreed and held that Walmart had violated the NLRA by "disciplining or discharging several associates because they were absent from work while on strike."

A Day Without a Woman, the NLRA and protected expression

A Day Without a Woman similarly calls for women to leave or absent themselves from work to attend or be part of a political demonstration. The question is whether these absences are protected as strikes under the NLRA. The NLRB General Counsel, the "prosecutor" in cases involving alleged violations of the NLRA, has issued a *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy* to provide some guidance to employers:

- non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonworking areas, is protected;
- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and
- leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules.

The Day Without organizers provide a template letter on their website for employees to give their employers explaining "the pervasive and systemic gender-based inequalities that still exist within our society, from the wage gap, to vulnerability to discrimination, sexual harassment, and job insecurity." It remains to be seen whether this would provide a sufficient nexus to the employee's terms and conditions of employment so that the walk-out would be protected under the NLRA.

Employers' responses to employee political advocacy

So, what can employers do? First, on-duty political advocacy is subject to restrictions imposed by lawful, neutrally-applied work rules. Employers can still impose discipline so long as it is done consistently; departing from a neutral, nondiscriminatory policy or past practice could result in an unfair labor practice charge.

Second, political activity related to employment concerns that occurs during nonworking time and in nonworking areas is generally protected by the NLRA. Typically, employees cannot be disciplined for this activity absent disruption of work operations or interference with the right of employers to maintain discipline in their establishments.

Third, employers need not pay non-exempt employees who take unexcused time off.

Fourth, employees can be reminded that there are multiple ways to support their cause and do not have to walk out because others are. Indeed, the Day's organizers note that if a woman cannot take off work, she should wear red "in solidarity."

Finally, employers must be wary of disciplining employees because of their social media posts. NLRB rulings have protected employees who engage in certain types of online discussions involving the terms and conditions of their employment or complaining about problems in the workplace.

Applying the General Counsel's Guidance and the NLRB's prior decisions to particular facts can be difficult, and the ramifications (both in terms of liability under the NLRA and in negative publicity) for making the wrong decision can be great. Before disciplining employees who walk out or absent themselves, therefore, employers are wise to seek counsel to ensure that they have satisfied all legal requirements. Moreover, these issues will likely reoccur (e.g., a second Day Without Immigrants is currently planned for May 1, 2017), so employers should consider now how they will approach them. Contact your Vorys lawyer if you have questions about best practices for addressing the impact of such political advocacy on your business operations