

May Day Issues: Employees Missing Work To Protest Immigration Reform

U.S. immigrant rights advocates have called for a nationwide boycott of work, school and commerce on May 1 to oppose the immigration reforms being proposed by the federal government. Many employers may be wondering what impact this may have on their workforce and what rights employers have in dealing with employees with unexcused absences.

An employer should start by examining the employment relationship it has with its employees. More specifically, the employer needs to determine whether the employees taking part in the boycott are employees at-will. Employees at-will are those employees who are employed without an employment contract or promise of employment for a specific duration. Employees subject to an employment contract usually can only be terminated for specific reason (i.e. “for cause”). Employees at-will, on the other hand, are not employed for any specific duration. Employment can be terminated by either the employer or the employee at any time, for any reason, with or without notice, provided that reason is not in violation of the law (i.e. an employee at-will cannot be terminated based on a legally protected class, such as sex, age, religion, race, disability, or national origin).

While the employment at-will doctrine gives an employer great latitude in terminating employees, an employer should rely on clear policies in regulating its workplace and enforce those policies consistently. Inconsistent treatment of similarly situated employees significantly increases the risk of discrimination claims as someone could allege the inconsistent treatment was based on an illegal distinction.

Participating in a boycott to protest a proposed law is not legally protected activity. That means an employer may treat employees with unexcused absences who participate in the May Day boycott in the same way the employer treats other employees with unexcused absences. Employers should examine all their leave of

absence policies when dealing with employees who fail to show up for work on May Day. If the absence has been excused (i.e. an employee uses vacation time or a personal day), the employer should treat the absence as an excused absence pursuant to its company policies. If, however, the absence is unexcused, the employer may discipline the employee as it would anyone else for an unexcused absence. In fact, if an employer failed to discipline an employee who took an unexcused absence to take part in May Day, but disciplines other employees for other unexcused absences, it could be argued that the employer was engaging in reverse discrimination, favoring those employees participating in May Day.

Immigration reform is a very emotional issue. Many members of the public have strong feelings on both sides of the issue. Employers therefore may experience some negative reaction regardless of what actions they take. Those employers who discipline employees participating in May Day may be viewed as being against foreign born employees, while employers who give May Day participants a day off may be viewed as promoting illegal immigration.

Due to the delicate nature of the issues involved, employers should give some thought to how they will treat employees participating in May Day. Either way, this issue is a reminder that employers should consistently review and apply their workplace practices.

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