



Can Employees Participate In Protests During Their Workday?

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Unions and union-front organizations are promoting a nationwide [Strike for Black Lives](#) at noon on Monday, July 20. These groups are encouraging employees to take at least eight minutes and forty-six seconds of their workday to take a knee, remain silent, or walk off the job. A website sponsored by the Service Employees International Union (SEIU) provides employees with step-by-step instructions on how to participate in the “8:46 Pledge” (a reference to the recent killing of George Floyd), including a sample “strike notice” to give their employers and buzz words to use (and avoid) to show their activities are protected by Section 7 of the National Labor Relations Act (NLRA).

The NLRA applies to both union and non-union employers. It is not clear under what circumstances the National Labor Relations Board would conclude that employers may discipline employees who participate in the “Strike for Black Lives.” The line between protected concerted activity and unprotected political advocacy is often thin, difficult to draw, and often varies with the composition of the Board. In these times, the Board may consider “taking a knee” or “walking off the job” to be protected as a form of concerted “political advocacy.” Yet, to be protected, the subject matter of the advocacy must be “directly related” to a specifically identified employment concern of

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the participating employees. Further, even if employee actions fall within the "mutual aid or protection" clause of Section 7, the time, place, and manner may ultimately render their actions unprotected.

Thus, employers should carefully evaluate the specific circumstances before disciplining employees who participate in Monday's Strike for Black Lives or other similar events. Also, they may find helpful guidance from the NLRB's Office of the General Counsel, which adopted the following general principles in the context of [immigration reform protests](#):

- Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, and that takes place during the employees' own time and in non-work 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
- 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.

In short, employers may have some leeway to apply facially neutral limits—such as on the use of “working time” or conduct in “work areas”; conduct that puts personal safety, customers, or property at risk; or conduct that violates an anti-discrimination policy.

Of course, union employees who leave or stop work to strike or protest may be subject to discipline if their actions violate a no-strike clause in their collective bargaining agreement. In addition, unionized healthcare employers are entitled to receive 10 days' notice of any strike under the NLRA.

Frankly, apart from business operations and employee discipline, there are [larger practical issues for employers](#). Organizations sponsoring Monday's Strike for Black Lives believe some employers will support the “8:46 Pledge,” or at least will not discipline employees who participate in the Strike because of ongoing social responsibility or “bridge building” initiatives, brand sensitivity, or to avoid public relations issues. Still other employers may choose varying degrees of discipline, because of their particular industry, because of discord such actions may trigger among employees, or because of their concerns about setting an untenable precedent.

While no one-size-fits-all, employers have options to mitigate the business, legal, and public relations risks associated with the “Strike for Black Lives” and similar protests in the future. Talk to your counsel. Whether, when, and how to react must take into account those factors that are unique to your workplace.