

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

S.A.M.

DATE: August 30, 2017

TO: Paula S. Sawyer, Regional Director  
Region 27

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: JVS Masonry, Inc. 506-0170  
Cases 27-CA-194772, 27-CA-194773, 506-2001-5000  
27-CA-194776, 27-CA-194777, 27-CA-194778, 506-2017-0100  
27-CA-194782, 27-CA-194784, 27-CA-194785, 506-2017-3300  
27-CA-194787, 27-CA-196206, 27-CA-196610 506-2017-4000  
506-4033-1700  
506-4033-5500  
506-6050-1200  
506-6050-2500  
506-6090-1900  
512-5036-6720  
512-5036-6720-5600  
512-5036-6720-7000  
512-7550-6000

These cases were submitted for advice as to whether employees' participation in the 2017 "Day Without Immigrants" is protected by the Act. We conclude that participation in this day of concerted action constitutes activity for employees' mutual aid or protection, and that the Employer violated Section 8(a)(1) by discharging employee-participants purportedly for missing work.

**FACTS**

JVS Masonry, Inc. ("Employer") is in the business of masonry construction in Commerce City, Colorado. It employs about 70 to 80 workers, including seven foremen who oversee work crews assigned to each construction project. The Region has already determined that the foreman for the two crews at issue here is a supervisor under Section 2(11) of the Act.

**Employees Missed Work to Support the "Day Without Immigrants"**

The 2017 "Day Without Immigrants" protests reprised similar nationwide and local demonstrations in 2006, wherein immigrants and others attended rallies and

abstained from working, shopping, and attending school in order to demonstrate the importance of immigrants to the economy.<sup>1</sup> In the weeks leading up to the 2017 protests, the Employer's workers learned about the day of action through television, radio, and social media, and they discussed the possibility of participating with their fellow crewmembers. On February 15, 2017,<sup>2</sup> a group of employees assigned to a school construction project approached the foreman during their lunch break to ask about taking the following day off to support the "Day Without Immigrants." Some employees offered to work the following weekend to make up the lost time. The foreman responded that they could take the day off and that he would support them by shutting down both jobsites he oversaw. He also told them he would inform the company's owner that the jobsites would be closed for the day. That same day, the lead worker on the second jobsite, a recreation center, called the foreman to ask permission for that crew to take the day off for the "Day Without Immigrants." The foreman also granted the second crew's request for leave.

Employees' stated reasons for participating in the "Day Without Immigrants" were varied. One employee described the movement partly as an effort to improve the working rights of immigrants. Others explained that they missed work, in part, to show their support for the labor supplied by immigrants. According to the foreman, the employees indicated a desire to participate because they are immigrants who matter and immigrants represent the vast majority of construction laborers. In press reports, the foreman explained that workers were motivated to participate because their families and friends were nervous to leave their homes for fear of arrest and deportation.<sup>3</sup>

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<sup>1</sup> See generally Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10, dated July 22, 2008 (concluding that employee support for the 2006 "Day Without Immigrants" was within the scope of the "mutual aid or protection" clause where the protests, in part, concerned proposed legislation designed to eliminate the employment of undocumented immigrants, such that there was a direct nexus between the subject matter of the protests and employees' interests as employees; further concluding that the Act's protection could be lost depending on the means utilized by employees in supporting these kinds of protests).

<sup>2</sup> All dates hereafter are in 2017, unless otherwise indicated.

<sup>3</sup> See Macradee Aegerter, *Local Workers Fired After Not Going to Work on "A Day Without Immigrants,"* KDVR-TV (Denver, Colo.), Feb. 18, 2017, <http://kdvr.com/2017/02/18/local-workers-fired-for-taking-park-in-a-day-without-immigrants/>; Emanuella Grinberg & Jay Croft, *Business Owners Stand by Decision*

In the afternoon of February 15, the foreman informed the company's owner that both jobsites would be shut down the next day because he had granted the two crews' requests for the day off so that they could participate in the "Day Without Immigrants." The owner merely responded that the foreman should remember what happened the last time. The foreman understood this comment to refer to the discharge of about 25 workers who had missed work to attend an immigration rally in Denver, Colorado a number of years before. The foreman did not share the owner's reaction with any other employees at that time.<sup>4</sup> The Employer takes the position that the employees were on notice the day before their absence that failing to appear for work would result in termination.

On February 16, the work crews at the school and recreation center jobsites did not attend work in order to show their support for the "Day Without Immigrants." That evening, the owner texted the foreman stating that anyone who missed work that day was terminated. The foreman responded that the crews would pick up their personal tools the following morning from the Employer's trailer. The owner then threatened to call the police if the workers cut the lock on his trailer. The owner also texted that when someone stands for what he believes in, he must be willing to pay the price. The foreman thereafter informed the two lead workers that the crews, which included about 30 workers, were fired.

On February 17, the two crews arrived at the school construction site to collect their tools. The owner failed to appear to unlock the trailer and did not answer the foreman's telephone calls. That afternoon, the person in charge of payroll delivered the employees' final paychecks to the construction site. It is unclear whether the employees were eventually able to recover their personal tools.<sup>5</sup>

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*to Fire Workers Who Protested*, CNN, Feb. 21, 2017,  
<http://www.cnn.com/2017/02/20/us/workers-fired-day-without-immigrants/>.

<sup>4</sup> Contrary to the foreman's recollection, one of the lead workers indicated that the foreman told "us" at the end of the work day on February 15 that the owner said to remember what happened the last time.

<sup>5</sup> Whether the employees had to purchase new tools in order to secure interim employment may be relevant in calculating the appropriate remedy. *See, e.g., Coronet Foods, Inc.*, 322 NLRB 837, 837 & n.4, 843-44 (1997), *enforced in part*, 158 F.3d 782 (4th Cir. 1998). *See also King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 8 (Aug. 24, 2016) (adopting "a new policy of awarding search-for-work and interim employment expenses regardless of employees' interim earnings and separately from taxable net back pay, with interest"), *enforced in relevant part*, 859 F.3d 23 (D.C. Cir. 2017).

That same day, one of the employees posted a video on Facebook showing the employees receiving their final paychecks. The owner thereafter posted a video on Facebook in which he offered to rehire the workers so long as they reported to his office the following Monday. Some of the discharged employees viewed the video, but others did not. One employee indicated that a few employees did return to work for the Employer.

### **The 2017 “Day Without Immigrants”**

In broad terms, the 2017 “Day Without Immigrants” arose in response to President Trump’s immigration agenda and campaign rhetoric, and it was aimed at highlighting the contributions immigrants make to the economy. The February 16, 2017 day of action—alternatingly referred to in the press as a strike, protest, or boycott—was a grassroots effort that called for immigrants to abstain from working, shopping, and attending school, and local marches and demonstrations were organized across the country.<sup>6</sup> Many businesses closed for the day in solidarity with their immigrant laborers or as a practical necessity because they were short-staffed.<sup>7</sup>

In the weeks leading up to the “Day Without Immigrants,” President Trump implemented a number of measures designed to crack down on undocumented immigrants living in the country and curb the influx of foreign nationals.<sup>8</sup> Consistent

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<sup>6</sup> See Bill Chappell, ‘A Day Without Immigrants’ Promises a National Strike Thursday, NAT’L PUBLIC RADIO, Feb. 16, 2017, <http://www.npr.org/sections/thetwo-way/2017/02/16/515555428/a-day-without-immigrants-promises-a-national-strike-thursday> (“boycott/strike”); Leanna Garfield, *Businesses Across the US Are Closing for the ‘Day Without Immigrants’ Protest*, BUS. INSIDER, Feb. 16, 2017, <http://www.businessinsider.com/day-without-immigrants-protest-strike-businesses2017-2> (“strike” and “protest”); Liz Robbins & Annie Correal, *On a ‘Day Without Immigrants’ Workers Show Their Presence by Staying Home*, N.Y. TIMES, Feb. 16, 2017, available at <https://www.nytimes.com/2017/02/16/nyregion/day-without-immigrants-boycott-trump-policy.html> (grassroots “boycott” and “protest”).

<sup>7</sup> See, e.g., Robbins & Correal, *supra* note 6.

<sup>8</sup> For example, the administration issued highly-publicized executive orders directing, inter alia, the construction of a physical wall along the southern border, a temporary ban on entry by individuals from majority-Muslim countries, and the suspension of refugee admissions programs. Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017); Exec. Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977, 8978-79 (Feb. 1, 2017).

with the President's campaign promise to deport millions of undocumented immigrants, the administration issued an executive order that, among other things, tripled the number of immigration enforcement officers and redefined the Department of Homeland Security's deportation priorities, greatly expanding the class of immigrants targeted for deportation.<sup>9</sup> Specifically, under the executive order, anyone who has been charged with a crime or has merely committed acts that constitute a chargeable criminal offense is a priority for deportation.<sup>10</sup> Experts believe this standard is broad enough to target up to 8 million unauthorized laborers, the vast majority of whom have worked in violation of law by making false claims on federal employment forms in order to secure a job.<sup>11</sup>

During the week prior to the "Day Without Immigrants," immigration agents conducted a series of large-scale raids that created a sense of panic among immigrant communities.<sup>12</sup> To many, the raids signaled a new, more aggressive crackdown on

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<sup>9</sup> Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017). *See also* Nat'l Immigration Law Ctr., *Understanding Trump's Executive Order Affecting Deportations & "Sanctuary" Cities*, Feb. 24, 2017, <https://www.nilc.org/issues/immigration-enforcement/exec-order-deportations-sanctuary-cities/> (hiring 10,000 new officers would triple current workforce of 5,000); Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. in One Week*, N.Y. TIMES, Feb. 12, 2017, available at <https://www.nytimes.com/2017/02/12/nyregion/immigration-arrests-sanctuary-city.html> (executive order "vastly expanded the group of immigrants considered priorities for deportation").

<sup>10</sup> Exec. Order No. 13768, 82 Fed. Reg. at 8800.

<sup>11</sup> Brian Bennett, *Not Just 'Bad Hombres,': Trump is Targeting Up to 8 Million People for Deportation*, L.A. TIMES, Feb. 4, 2017, available at <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>. *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (Immigration Reform and Control Act of 1986 "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.").

<sup>12</sup> *See* Robbins & Dickerson, *supra* note 9; Chappell, *supra* note 6; Lisa Rein et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST, Feb. 11, 2017, available at [https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.7289747fd555](https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.7289747fd555).

undocumented immigrants, and validated fears that bystanders without criminal records would not be spared if they happened to be present during a raid.<sup>13</sup> As a result of these raids, many immigrants became fearful of going to work.<sup>14</sup> The raids took place in both homes and workplaces and were reminiscent of enforcement efforts by previous administrations involving worksite raids that rounded up all unauthorized workers.<sup>15</sup> Many had predicted that workplace apprehensions would play a vital role in meeting President Trump’s goal of swiftly deporting millions of undocumented immigrants,<sup>16</sup> and anxiety about the possible revival of workplace raids appears to have been well-founded.<sup>17</sup>

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<sup>13</sup> See Robbins & Dickerson, *supra* note 9; Chappell, *supra* note 6; Rein, *supra* note 12; Camila Domonoske, *75 Percent of Immigration Raid Arrests Were for Criminal Convictions*, NAT’L PUBLIC RADIO, Feb. 13, 2017, <http://www.npr.org/sections/thetwo-way/2017/02/13/515032423/75-percent-of-immigration-raid-arrests-were-for-criminal-convictions-dhs-says> (prior week’s arrests “included ‘collateral damage,’ or people who were picked up despite not being targeted in the operations—because, for example, they were in the same place as a person who *was* targeted, and did not have documentation”); Nicholas Kulish, et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES, Feb. 25, 2017, *available at* <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html> (Under the Trump administration, “[b]ystanders are now being taken in if they are suspected to be undocumented, even if they have committed no crime, known within the agency as ‘collateral’ arrests. While these arrests occurred under the Obama administration, they were officially discouraged, to the frustration of many [immigration] agents.”). See also Maria Sacchetti & Ed O’Keefe, *ICE Data Shows Half of Immigrants Arrested in Raids Had Traffic Convictions or No Record*, WASH. POST, Apr. 28, 2017, *available at* [https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853\\_story.html?utm\\_term=.9db6db4fe48e](https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853_story.html?utm_term=.9db6db4fe48e) (arrests of immigrants with no criminal record more than doubled in early 2017 as compared to same period in 2016).

<sup>14</sup> See Mizue Aizeki, *Families Fearing Deportation Because of Trump’s Immigration Policies Prepare for I.C.E. Raid*, NEWSWEEK, June 28, 2017, *available at* <http://www.newsweek.com/immigration-immigration-and-customs-enforcement-ice-donald-trump-628896> (“many immigrants scared to take their children to school or to show up for work”).

<sup>15</sup> Rein, *supra* note 12.

<sup>16</sup> See Brian Bennett, *When Trump Says He Wants to Deport Criminals, He Means Something Starkly Different Than Obama*, L.A. TIMES, Nov. 14, 2016, *available at*

### ACTION

We conclude that employees' participation in the "Day Without Immigrants" constitutes activity for mutual aid or protection, and that the Employer unlawfully discharged employees who supported the day of action under the circumstances present here.

### Participation in the 2017 "Day Without Immigrants" Was For "Mutual Aid or Protection"

Section 7 grants employees the right to engage in "concerted" activities for the purpose of "mutual aid or protection." The latter element "focuses on the *goal* of concerted activity," specifically, "whether there is a link between the activity and

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<http://www.latimes.com/politics/la-na-pol-trump-immigration-criminals-20161114-story.html> ("Trump's advisors are drafting plans to resume workplace raids . . . in an effort to meet Trump's goal to deport 2 million to 3 million migrants who he says are criminals. . . . To boost the tallies, his advisors say, Trump will probably reinstate workplace raids to find those in the country illegally, to push illegal immigrants out of jobs and to send a signal across the borders . . ."); Amy Chozick, *Raids of Illegal Immigrants Bring Harsh Memories, and Strong Fears*, N.Y. TIMES, Jan. 2, 2017, available at <https://www.nytimes.com/2017/01/02/us/illegal-immigrants-raids-deportation.html> (experts anticipate return of workplace raids to meet Trump's deportation goals); Brian Bennett, *As Soon As He is Inaugurated, Trump Will Move to Clamp Down on Immigration*, L.A. TIMES, Jan. 19, 2017, available at <http://www.latimes.com/nation/la-na-pol-trump-immigration-actions-20170119-story.html> (advocates predict workplace raids).

<sup>17</sup> See Aizeki, *supra* note 14 (50 percent increase in community arrests, such as at work, during first 100 days of 2017 compared to 2016). See also Tim Carman & Avi Self, *An ICE Agent Visited a Restaurant. About 30 Employees Quit the Next Day, Its Owner Says*, WASH. POST, June 27, 2017, available at [https://www.washingtonpost.com/news/food/wp/2017/06/27/an-ice-agent-visited-a-restaurant-about-30-employees-quit-the-next-day-its-owner-says/?utm\\_term=.12db1d70b788](https://www.washingtonpost.com/news/food/wp/2017/06/27/an-ice-agent-visited-a-restaurant-about-30-employees-quit-the-next-day-its-owner-says/?utm_term=.12db1d70b788); Associated Press, *ICE Agents Eat Breakfast, Compliment Chef, Then Arrest 3 Workers at Michigan Restaurant*, CHI. TRIB., May 26, 2017, available at <http://www.chicagotribune.com/news/nationworld/midwest/ct-michigan-restaurant-immigration-arrests-20170525-story.html>; Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*, PHILA. INQUIRER, May 7, 2017, available at <http://www.philly.com/philly/news/ice-raid-mushroom-fear-deport-chester-county.html>.

matters concerning the workplace or employees' interests as employees."<sup>18</sup> The Board analyzes whether an activity is for "mutual aid or protection" using an objective standard; thus, employees' subjective motives are irrelevant.<sup>19</sup>

The "mutual aid or protection" clause covers employee efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship" as well as activities "in support of employees of employers other than their own."<sup>20</sup> Thus, the Board has long recognized that Section 7 protection extends to concerted political advocacy when the subject matter of that advocacy has a direct nexus to employees' "interests as employees," based on a totality of the circumstances.<sup>21</sup> For example, in *Kaiser Engineers*,<sup>22</sup> the Board held that a group

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<sup>18</sup> *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

<sup>19</sup> *Id.* ("The motive of the actor in a labor dispute must be distinguished from the purpose for his activity." (quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976))).

<sup>20</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 559-60, 565 (1978) (upholding Section 7 protection for distribution of literature that, inter alia, urged employees to vote for candidates supporting a federal minimum wage increase and to lobby legislators against incorporation of right-to-work statute into state constitution).

<sup>21</sup> *Id.* at 565-67 (efforts to "improve working conditions through resort to administrative and judicial forums" and "appeals to legislators to protect their interests as employees" are protected). See *Nellis Cab Co.*, 362 NLRB No. 185, slip op. at 2 (Aug. 27, 2015) (extended break during which taxicab drivers drove down boulevard honking and flashing lights while refusing to pick up passengers protected where object was to protest taxicab authority's possible issuance of additional medallions, which would likely decrease drivers' pay); *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976); Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10, at 3-7. See also *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007) ("written communication must be viewed 'in its entirety and in context' in order to determine whether there is a nexus" (quoting *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 450 (2005), *enforcement denied*, 453 F.3d 532 (D.C. Cir. 2006))), *enforced*, 522 F.3d 46 (1st Cir. 2008); *Senior Citizens Coordinating Council of Co-op City*, 330 NLRB 1100, 1104 n.15 (2000) (nexus "gleaned from the totality of the circumstances" (quoting *Atlantic-Pacific Constr. Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995))).

<sup>22</sup> 213 NLRB 752, *cited with approval in Eastex*, 437 U.S. at 566 n.16.

letter to Congress, in which employees opposed a competitor's rumored application to the labor department to ease restrictions on visas for foreign engineers, was protected where the apparent reason for the letter was concern that an influx of foreign workers would threaten the job security of the employees and others in the profession.<sup>23</sup>

Here, participation in the "Day Without Immigrants" falls within the scope of the "mutual aid or protection" clause given that the day of action was in response to, inter alia, the sudden crackdown on undocumented immigrants living and working in the United States and the possible revival of immigration raids in the workplace.<sup>24</sup> On a basic level, these government actions plainly threaten the job security of unauthorized workers, many of whom came to this country to seek employment and are now at risk of deportation because they presented false documents in order to secure a job.<sup>25</sup> Given that up to 8 million unauthorized laborers are now priorities for deportation, it is no coincidence that missing work was a central element of the day of action. Immigrants' absence from work was not only a political gesture aimed at the new administration—it was also a show of strength aimed at employers and the business community for the purpose of eliciting respect and support for their labor and continued presence in the country.

Moreover, the subject matter of the employees' advocacy on the "Day Without Immigrants" is connected to employees' interests as employees because more vigorous

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<sup>23</sup> *Id.* at 755. See also *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999) (union's intervention before state environmental and other regulatory permit proceedings protected where objective was to secure a living wage for non-unionized employees, thereby expanding union job opportunities, improving union's ability to bargain for higher wages, and furthering employee health and safety), *enforced*, 240 F.3d 26 (D.C. Cir. 2001); *Tradesmen International, Inc.*, 332 NLRB 1158, 1159-60 (2000) (union organizer's testimony to municipal board that nonunion contractor was subject to bonding requirement protected because union sought to level the playing field between union and nonunion contractors, thereby protecting job opportunities of unionized employees), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002).

<sup>24</sup> Whether workplace raids actually have or will become a common practice again under the Trump administration is irrelevant. See, e.g., *Union Carbide Corp.*, 259 NLRB 974, 977 (1981) (taxpayer petition complaining of employer's use of government funds to fund anti-union campaign protected "whether the premise on which it was based was ill founded or not"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983).

<sup>25</sup> See *Kaiser Engineers*, 213 NLRB at 755 (political letter protected where employees evidently feared that relaxing immigration laws might affect job security).

immigration enforcement will likely cause employment standards and working conditions to deteriorate for all workers, especially in lower-wage industries.<sup>26</sup> Laws that protect employees' wages, health and safety, and entitlement to breaks, not to mention collective-bargaining rights, largely rely on workers filing complaints with government authorities.<sup>27</sup> In a climate of aggressive immigration enforcement, undocumented immigrants are less likely to initiate complaints, or exercise their right to organize for better working conditions, for fear that their employer will retaliate by contacting immigration authorities, a tactic commonly used by employers.<sup>28</sup> Indeed, even documented immigrants may be reluctant to report workplace violations or attempt to otherwise better their working conditions due to concern that it may expose co-workers or family members to scrutiny by immigration authorities.<sup>29</sup> This is particularly true in the current climate, given that immigration officers have more freedom to arrest bystanders when conducting raids, including at homes and workplaces.<sup>30</sup> In light of these realities, workers participating in the "Day

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<sup>26</sup> See Laura D. Francis, *Fear of Immigration Raids May Harm Workplace Rights*, BLOOMBERG BNA, Mar. 1, 2017, <https://www.bna.com/fear-immigration-raids-n57982084586/>; Justin Miller, *Trump's Immigration Crackdown is Dangerous for Workers (Not Just Immigrants)*, AMER. PROSPECT, Jan. 31, 2017, available at <http://prospect.org/article/trump%E2%80%99s-immigration-crackdown-dangerous-workers-not-just-immigrants>.

<sup>27</sup> See Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, in *THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES* 89, 93-94 (Alissa R. Ackerman & Rich Furman eds., 2014), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2059&context=articles>.

<sup>28</sup> *Id.* at 95-96. See also Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 392-93 (2004) (fact that 55 percent of workplace immigration raids in New York City occurred in the midst of a wage and hour or other labor dispute "not surprising, as some employers have long seized upon [immigration] raids as a tool to retaliate against workers and escape liability for labor violations").

<sup>29</sup> See *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 3 n.7 (Sept. 8, 2014) ("even documented workers may be intimidated by threatened scrutiny of their immigration status, for they 'may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends'" (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004))); Miller, *supra* note 26.

<sup>30</sup> See Domonoske, *supra* note 13; Kulish, *supra* note 13.

Without Immigrants” could reasonably be concerned about greater exploitation on the job as a result of the new administration’s more vigorous approach to immigration enforcement.

Finally, the subject matter of employees’ advocacy is linked to work-related concerns because workplace raids and stricter enforcement will likely diminish workers’ employment opportunities. First, employers may avoid hiring immigrants due to fear that employing an immigrant workforce may prompt a workplace raid, increase the risk of criminal and civil sanctions under immigration laws, or create unwanted turnover due to employee deportations.<sup>31</sup> Even documented workers’ employment prospects could be affected, since vigorous immigration enforcement would likely discourage employers from hiring individuals who merely look or sound “foreign.”<sup>32</sup> In addition, undocumented workers may feel so threatened by the possibility of workplace raids that they might limit their job search to so-called “sanctuary” employers or jurisdictions that require employers to mitigate the impact of workplace raids on their employees.<sup>33</sup>

We would reject any argument by the Employer that the nexus between the 2017 “Day Without Immigrants” and immigrants’ concerns as employees is too tenuous because the primary thrust of the 2017 protests concerned deportation itself, rather than, as in 2006, proposed legislation expressly regulating the *employment* of

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<sup>31</sup> See Vin Gurrieri, *Trump’s Immigration Plans Put Employers, Workers On Edge*, LAW360, Mar. 1, 2017, <https://www.law360.com/articles/897103/trump-s-immigration-plans-put-employers-workers-on-edge> (employers concerned about “heightened scrutiny” by immigration enforcement agents, being caught for immigration violations, and losing a “large segment of [their] workforce”).

<sup>32</sup> See Griffith, *supra* note 27 at 93-94.

<sup>33</sup> Hundreds of restaurants nationwide have designated themselves “sanctuary restaurants,” a label indicating that an employer has received education about how to handle immigration agents during a possible raid. See Justin Phillips, *Bay Area Restaurants Register As Sanctuary Businesses*, S.F. CHRON., Feb. 16, 2017, available at <http://www.sfchronicle.com/restaurants/article/Bay-Area-restaurants-register-as-sanctuary-10938249.php>. The California legislature is considering a bill that would require employers to take measures to shield workers during workplace raids, such as by insisting on a judicial warrant or subpoena before granting access to immigration agents. Associated Press, *California Assembly OKs Protection Against Workplace Raids*, VENTURA COUNTY STAR, June 1, 2017, <http://www.vcstar.com/story/news/2017/06/01/assembly-oks-protection-against-workplace-raids/361111001/>.

undocumented immigrants.<sup>34</sup> Loss of employment is an inevitable consequence of deportation, and thus job-related concerns are naturally implicated when employees perceive a greater risk of being expelled from the country. Moreover, as explained above, there is a direct nexus here because employees could reasonably believe that the Trump administration’s immigration agenda—particularly the more aggressive immigration enforcement, including workplace raids—would harm their terms of employment and work prospects.<sup>35</sup> Indeed, several employees described the day of action as a work stoppage for the purpose of valuing immigrants’ labor, and one described the “Day Without Immigrants” movement as an effort to obtain better working rights for immigrants.

Likewise, any contention that participation in the 2017 protests should be unprotected because the new administration’s executive orders do not specifically mention the *employment* of immigrants is unavailing. The Board has found activity to be protected even when the subject matter of the government petitioning is not explicitly or obviously connected to workplace concerns. For example, in *Petrochem Insulation*,<sup>36</sup> the Board found that a union campaign, which consisted of filing various environmental objections and challenging the issuance of permits, was protected, and therefore the employer violated Section 8(a)(1) by filing a meritless and retaliatory lawsuit to enjoin the union’s activities.<sup>37</sup> The Board reasoned that the petitioning was protected because the union’s objective was to secure a living wage for employees at non-union construction companies, which the Board considered to be a form of area-standards campaign.<sup>38</sup> Likewise, in *Tradesmen International*,<sup>39</sup> the Board

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<sup>34</sup> In this regard, the Employer will likely point to the foreman’s statement to the press that the workers’ actions were in response to fear among their families and friends of being arrested and deported. *See Aegerter, supra* note 3; Grinberg & Croft, *supra* note 3. However, the foreman’s hearsay statement to the press does not meaningfully aid the Employer’s defense, since the statement does not purport to capture the full spectrum of employee reasons for participating.

<sup>35</sup> *See Senior Citizens Coordinating Council*, 330 NLRB at 1104 (complaint about lack of supervision to city agency had a “direct impact” on working conditions where employees “could reasonably believe” their jobs might be in jeopardy).

<sup>36</sup> 330 NLRB 47.

<sup>37</sup> *Id.* at 48, 50-51.

<sup>38</sup> *Id.* at 49.

<sup>39</sup> 332 NLRB 1158.

found protected a union organizer’s testimony before a city building standards board urging application of a surety bond requirement to a labor supply firm. Although the ordinance did not relate to working conditions, nor did the testimony refer to that subject,<sup>40</sup> the Board reasoned that there was a nexus because the testimony was “designed to protect local unionized companies and, in turn, the job opportunities of their employees” by leveling the playing field between union and non-union contractors.<sup>41</sup> Thus, the fact that President Trump’s executive order relating to deportation priorities did not explicitly target immigrants’ jobs does not undercut the direct nexus between the day of action and employees’ interests as employees.<sup>42</sup>

### **Discharge of Employee-Participants Violated Section 8(a)(1)**

An employer does not violate the Act by disciplining employees who absent themselves from work without permission to engage in a protected activity where the activity is not a “strike, withholding of work, or other permissible form of protest.”<sup>43</sup> The Employer contends that the employees were discharged for failing to show up for work, having been advised on Wednesday, February 15, that they would be terminated if they were absent the next day. However, the evidence establishes that the foreman gave employees permission to miss work to attend the “Day Without Immigrants.”<sup>44</sup> Although the owner’s comment that the foreman should remember what happened the last time constitutes a veiled threat of termination,

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<sup>40</sup> *See id.* at 1162 (Member Hurtgen, dissenting).

<sup>41</sup> *Id.* at 1159-60.

<sup>42</sup> Indeed, President Trump’s advisors anticipated bringing back workplace raids, in part, for the very purpose of displacing immigrants from their jobs. *See Bennett, When Trump Says He Wants to Deport Criminals, He Means Something Starkly Different Than Obama, supra* note 16.

<sup>43</sup> *E.g., Quantum Electric, Inc.*, 341 NLRB 1270, 1279 (2004).

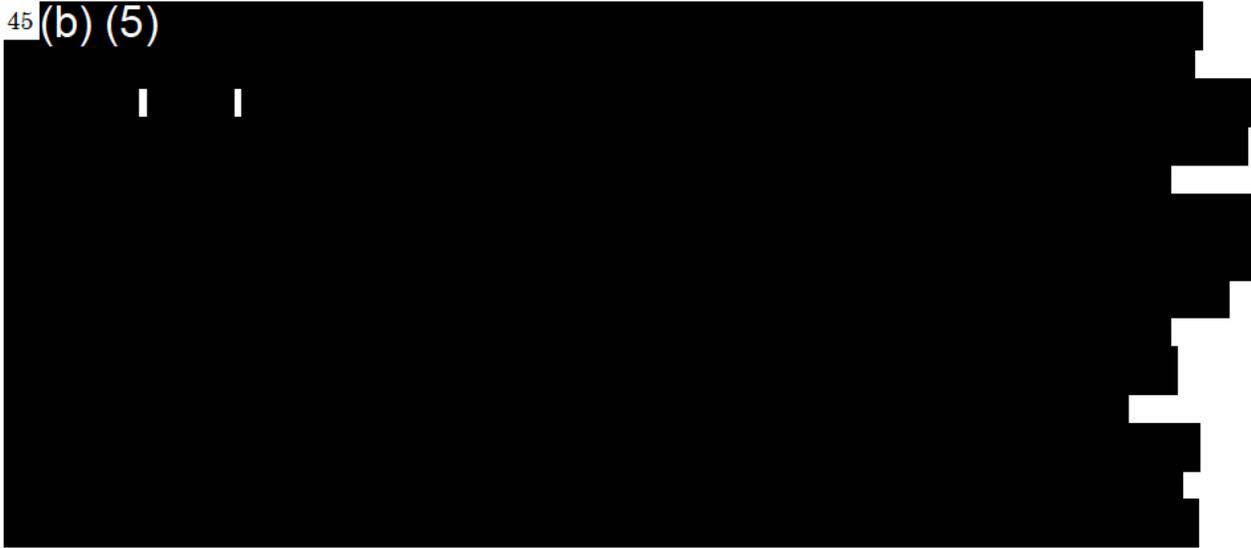
<sup>44</sup> Since employees had permission to be away from work, we would not analyze their activity as a strike. *See, e.g., Burnup & Sims, Inc.*, 256 NLRB 965, 977 (1981) (rejecting argument that employer lawfully replaced employees because “a strike presupposes the withholding of services . . . [but each] crewmember requested and obtained permission from [the supervisor] to be off work”).

the foreman indicates that he did not share this comment with any employees that day.<sup>45</sup> Thus, employees were left with the impression that they had permission from their supervisor to be absent from work, and the Employer violated Section 8(a)(1) by discharging them.<sup>46</sup>

In any event, the Employer's defense is without merit because its reliance on the employees' absence from work is pretextual. After discharging the employees, the owner stated in a text message that when someone stands for what he believes in, he must be willing to pay the price. This statement reveals that the employees were discharged for their protected concerted activity of "standing up for" the interests of immigrant laborers, and not for missing work. Moreover, the statement reveals animus towards employees' protected concerted activity, which demonstrates that the discharges were discriminatorily motivated.<sup>47</sup> Indeed, this was apparently

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<sup>45</sup> (b) (5)



<sup>46</sup> See *Burnup & Sims*, 256 NLRB at 965, 970 & n.10, 974-77 (employer unlawfully discharged employees who missed work to collectively seek assistance from union, NLRB, and EEOC where supervisor granted entire crew the day off and employer was bound by supervisor's action). (b) (5)



<sup>47</sup> Cf. *Chautauqua Hardware Corp.*, 103 NLRB 723, 728-30 (1953) (discriminatory suspension of employees who left work to assist union at representation hearing

the second time the Employer had discharged a substantial number of employees for participating in an immigration-related demonstration.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by discharging the employees for participating in the “Day Without Immigrants.”

/s/  
J.L.S.

ADV.27-CA-194772.Response.JVSMasonry (b) (6), (b) (7)

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without employer’s permission where employer motivated by anti-union animus rather than legitimate business considerations), *enforced*, 208 F.2d 750 (2d Cir. 1953).