

Know Your Rights

Can an Employer Fire an Employee Because the Employee Participated in an Immigration Rally?

Recently, people from across the country missed work to participate in immigration rallies. Unfortunately, a number of these individuals lost their jobs. These recent events have many wondering whether an employer can lawfully terminate an employee for missing work to attend an immigration rally. This pamphlet provides a general overview of the law. It is not intended to provide legal advice.

For more information see:

United States Citizenship and Immigration Services at:
<http://www.uscis.gov/graphics/howdoi/EEV.htm>

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Employees have the right to join together in an attempt to improve their wages, hours and other employment conditions. This right, however, does not permit employees to be late for work or to miss work. In most situations, an employer can fire an employee when the employee is absent without permission, even when the employee misses work to exercise her legal rights. Therefore, if an employee misses work to attend an immigration rally, an employer may be able to lawfully terminate the employee if the following conditions are met:

- The employee was hired at will. In other words, both the employer and the employee can terminate the relationship at any time for almost any reason
- At the time of the absence, the employer had an attendance policy in place
- Under the attendance policy, the employee's absence is considered unexcused. These policies usually categorize an unexcused absence as any absence where an employer has not approved an employee's request to use vacation, personal or sick leave. Employees should check their employer's policy to determine what constitutes an unexcused absence
- The employer impartially granted employees' requests to use their personal or vacation time, whether the employee requested time off to attend an immigration rally or for another reason
- The employer has a legitimate business reason for having an attendance policy
- The employer did not punish employees who missed work to attend the rallies more severely than other employees who had unexcused absences

How to Attend an Immigration Rally and Avoid Being Terminated

- Try to use your vacation or personal time. Look at the attendance policy and determine how far in advance you need to request vacation or personal time. Keep in mind that your employer may limit the number of employees that can be absent on any particular day. Ask your employer whether their attendance policy limits the number of employees that can be absent on a particular day. If the policy does limit the number of employees that can be absent, then ask your employer how they determine which employees get the day off.
- Try to switch shifts or work extra shifts. If you cannot use vacation or personal time, ask your employer before the rally if you can be absent on the day of the rally in exchange for working extra shifts or switching shifts with another employee. If your employer allows you to switch days or work extra shifts, have your employer put your agreement in writing. Then, if you do get terminated, you will have a record of your agreement.
- Review your employer's sick leave policy. Most likely the policy will limit sick leave to instances when you or a family member is actually ill.
- Review your employer's attendance policy. Specifically, review the consequences for an unexcused absence. Ask your employer what will happen if you miss work in order to attend the rally. Ask your employer to put his response in writing. This will serve as a record in case you are terminated.
- Other options. If you are unable to take the day off, try to participate in the rally during your breaks or over your lunch hour.

What to Do If You Are Fired for Attending an Immigration Rally

- Stay calm. Do not panic or yell at your boss. Listen very carefully to what is being told to you. Calmly ask for some time to think about what has just been said, and to ask any questions you may have. If you are told to leave the job site immediately, ask for the name and phone number of the person you should call if you have any questions. Request an opportunity to gather your personal possessions, and leave. Be certain to collect any tools, property, or supplies you personally brought to the job.
- Ask why you were fired. Even if you are an “at will” employee, you should ask the person firing you why you are being fired. If you receive only one reason for being fired, that might be the only reason your employer can give to a court or agency determining unemployment compensation or other benefits. Carefully record the exact reason you were given. Write down the name of the person who told you. Some states have laws that require employers to tell employees in writing why they are being fired. If the company fails to respond to your request, you may be able to sue your former employer. You typically cannot be fired just for participating in a political rally. However, if there are other valid reasons (you skipped work or left early without permission, or you came in late), it may be more difficult to contest the decision.
- Ask who made the decision to fire you. Be sure you have the name of the person who actually had the ability to fire you, even if the person telling you that you are fired was your boss. If the person who had authority to fire you was not the person who supervised you, ask how the person with the ability to fire you made their decision, and who they spoke to about firing you. If the decision to fire you was based on someone else’s word, or other erroneous information, and you were not given an opportunity to defend yourself, you may be able to talk to the person who made the decision.
- Think carefully about what you were promised. If you are promised the entire day off or the time of the rally off, write down the time and place that promise was made, who made the promise and who witnessed it. At times, these promises can be considered binding contracts. If you ask your employer to reconsider a decision because of a promise that was made to you by a supervisor, your employer will need specific information about what was promised, and who promised it.
- Ask to see your personnel file. Not all states require employers to show terminated workers the contents of their personnel files. However, if you are able to view this file, it could contain favorable recommendations and comments that may protect you from getting bad recommendations as you look for a new job. If your performance record is poor, you may be barred from contesting your employer’s decision to fire you. If your employer refuses to let you see the contents of your file, ask for written confirmation that the file will not be shared with anyone else without your permission.
- If you signed a written employment contract, reread it. Look carefully at what it says about termination. If the company fails to act according to the contract, your rights may have been violated, and you may be entitled to payment. Also, carefully review your employment handbook, or company rules. While these are not always considered part of your employment contract, in certain cases they can be.
- Ask for your final paycheck. In most states, you are entitled to payment for all hours you have worked up to the time you are fired, and payment for unexpired vacation or sick leave time you have accrued, at the time you are fired. If your employer refuses, you may be able to sue for payment.
- Carefully review all documents before you sign them. Sometimes employers ask employees to sign a “release,” or a promise not to sue, in exchange for money. You are entitled to money you have already earned regardless of whether you sign a release or not. In fact, in most states, an employer is not allowed to use your last paycheck as a way to force you to sign a release. However, if you have already received your final paycheck, and an employer is offering you money in exchange for your signature, be sure you understand what you are signing before you sign it.
- Return company property. Do not take any tools or supplies provided by your employer, and do not wait for your employer to ask for you to return any items he or she provided to you. Things like automobile keys, tools, phones, and samples must be returned to avoid claims of theft, fraud, and breach of contract. When returning items by mail, get a receipt to prove delivery. When returning items in person, ask your employer to provide you with a signature stating that he or she has received the item. Remember that if you signed a paper to receive an item, you probably need to sign the same or another paper stating that you returned the item.

- Find out if you are eligible for unemployment benefits under state law. While undocumented workers are often barred from receiving benefits, you do not have to be a U.S. Citizen to claim unemployment. You can request a hearing if you feel benefits were unfairly denied.
- Find out what your employer intends to tell others about you. Many states have enacted anti-blacklisting statutes that punish employers for intentionally trying to prevent former employees from finding work. In some states, untruthful job references are treated as crimes. You may also be able to assert a lawsuit based on defamation and emotional distress if you discover that your employer is sharing confidential information with others.

If you find out your former employer is providing negative references to potential employers, send a letter, by certified mail, return receipt requested, informing your former employer of what you have learned and put the employer on notice of your desire to take prompt legal action if the problem persists.

- Find a lawyer you trust. If you are owed wages, vacation pay, or other compensation, or believe the employer violated the law or your contract, speak with an attorney. Many statutes offer attorneys' fees if you prevail. Some attorneys take cases on a pro bono (for free) basis. Some attorneys may take a case on a contingency basis, which means you don't have to pay them if you don't win your case. All lawyers should be able to find someone who can translate into your language. Every state has a state bar association that keeps a list of lawyers who accept referrals for various types of cases, and are willing to consult with you for a certain amount of time for a set fee. Other lawyers and lawyer organizations (often called bar associations) may be able to provide referrals.

Keep all your documents related to your employer together. You will need to keep any notes you write about what your employer has stated, and any documents your employer gives you, from the day you were hired, to the day you are fired, in a place where you can easily find them. This will help you or your attorney to provide quick and accurate information if you contest the decision, or if you are asked by a potential employer.

Can an Employer Re-Evaluate an Employee's Immigration Status Because the Employee Participated in an Immigration Rally

In general, the answer is no. If an employer properly examined and verified an employee's I-9 Employment Eligibility Verification Form, then an employer may not review the employee's immigration status again except as described below. An employer has properly examined and verified an employee's I-9 form if the employer reviewed the eligibility and identification forms that accompanied the I-9. If the documents appear to be genuine, then an employer must accept the documents as true. Therefore, in most cases, an employer cannot re-evaluate an employee's immigration status just because the employee participated in an immigration rally.

There are some exceptions that allow an employer to review an employee's immigration status even after the employee is hired:

- **Confession of fraudulent documents:** If an employee confesses that their documents are fraudulent, then an employer is allowed to review their immigration status. The law requires the employer to immediately terminate the employee. The employer has the right to rehire the employee if the employee submits a genuine I-9 form and documents proving employment eligibility and identification that are free of misrepresentation and fraud.
- **Employer knows that employee is unauthorized to work:** It is illegal for an employer, who knows that an employee is or has become an unauthorized alien, to continue their employment.
- **The government can check an employee's status:** The U.S. Department of Homeland Security, can investigate an employee's immigration status at any time. If the government determines an employee is unlawfully employed, it can issue a warning or notice of intent to fine to the employee or employer. The government will not fine an employer for hiring an individual with fraudulent documents, if the employer reviewed the documents and believed that they were genuine.
- **The employee had temporary work authorization.** If the original I-9 indicated the employee was temporarily authorized to work, the employer is required to re-verify eligibility for continued employment on or before the date the temporary work authorization expires. This may only be done in connection with expiring work authorization however.

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