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

Advice Memorandum

S.A.M. DATE: August 30, 2017

TO: Terry Morgan, Regional Director
Region 7

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: EZ Industrial Solutions, LLC
Case 07-CA-193475

506-0170
506-4033-5500
506-6050-1200
506-6090-1900
512-5006-5036
512-5030-4090
512-5030-5000
512-5030-7000
512-5036-0133
512-5036-6720-5000
512-7550-6000

The Region requested advice as to whether EZ Industrial Solutions, LLC (the "Employer") violated: (1) Section 8(a)(1) by threatening to suspend employees on February 15, 2017,[1] thereafter discharging eighteen employees on February 17 in retaliation for their support of the February 16 "Day Without Immigrants" national protest, and interrogating a former employee about the discharged employees' legal representation before the Board; and (2) Section 8(a)(1) and/or (4) by threatening to report discharged employees to immigration services.

We conclude that the employees' participation in the "Day Without Immigrants" was for their mutual aid or protection and constituted a protected strike. The Employer therefore violated Section 8(a)(1) by threatening to suspend, and thereafter terminating, the eighteen employees for engaging in a protected strike vis-à-vis the "Day Without Immigrants" national protest. In the alternative, the Region should argue that, even if the employees were not engaged in a strike, the Employer violated Section 8(a)(1) by discriminatorily applying its attendance policy to discharge the eighteen employees who participated in the "Day Without Immigrants" protest. We further conclude that the Employer violated Section 8(a)(1) by interrogating a former employee about the discharged employees' legal representation before the Board and

[1] Unless otherwise specified, all dates herein are 2017.

Section 8(a)(4) by threatening the discharged employees' immigration status. The Region should therefore issue complaint, absent settlement.

FACTS

The Employer specializes in secondary operations for the automotive fastener and stamping industry. Approximately thirty of the Employer's seventy employees at its Chesterfield, Michigan factory work as hand sorters ("sorters"). Sorters are responsible for physically inspecting bolts and fasteners, one-by-one, and expected to inspect about 1,000 parts per hour. The majority of the sorters are Mexican born immigrants who only speak Spanish, whereas the Employer's management is composed almost exclusively of English speakers.[2]

I. 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.[3] In the weeks leading up to the February protests, the Employer's workers learned about the planned day of action through television, radio, and social media, and they discussed participating with their fellow employees. There was a growing opinion amongst the Employer's sorters that "no Mexican should work" in support of the "Day Without Immigrants."

On February 13, employees asked Assistant Manager if (b)(6), (b) was going to participate in the "Day Without Immigrants." The next day, Assistant Manager informed both Manager and Owner that some of the employees planned to withhold their labor on February 16. In response, Manager and Owner instructed Assistant Manager to inform the employees that: they were important to the Employer; it was not the Employer's fault that the new President's administration had taken a more

[2] Accordingly, communication between the two groups is constrained and both sides primarily rely upon Assistant Manager for translation.

[3] *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 Immigrant" protests 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).

aggressive approach on immigration; the Employer could not meet customer demands if a large number of employees failed to report to work on a single day; and, employees were expected to report to work on February 16 and if they did not report as required, and were not otherwise excused, they would be fired.

On February 15, Assistant Manager directed Supervisors A and B to inform employees that they were expected to work and, if they did not report to work on February 16, they would be subject to layoff or termination.[4] Later that day, Assistant Manager approached each work table, and asked employees if they intended to report to work on February 16. Most responded that they did not know, while others hesitantly answered, without explanation, that they would not be reporting to work.[5]

On February 16, eighteen sorters, in addition to Supervisors A and B, withheld their work from the Employer in support of the "Day Without Immigrants." Only one of the eighteen employees texted [redacted] supervisor that [redacted] was not coming to work; the remaining employees did not alert the Employer of their absences on that day because: they already informed Assistant Manager they would not be reporting to work, they never provided advance notice about absences in the past, or, based on Assistant Manager's statements, they assumed they were going to be suspended or fired for their action. The Employer's records indicate that all eighteen employees and Supervisors A and B were officially terminated on February 17 for "no call no show/insubordination/sabotage."

The parties agree that the Employer has no formal written rules or attendance policies. About half of the employees who testified said that it was common practice to take time off from work for any reason without requesting or providing any advance notice or documentation to the Employer upon departure from or return to work. The other half stated they would routinely provide advance notification to a supervisor when requesting time off and provide documentation explaining their absence upon their return to work. Notwithstanding the lack of a formal attendance policy, the Employer produced a list of employees who were terminated from January 2015 through March 2017. In addition to the eighteen employees who were

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[4] Supervisor A testified that Assistant Manager stated that employees who did not report to work on February 16 would be subject to a one week suspension—not termination. Additionally, Supervisors A and B spoke with each other independent of Assistant Manager, and they decided that they would not advise employees as directed; rather, they would leave that task up to Assistant Manager.

[5] Some employees testified that Assistant Manager told them that failure to report to work on February 16 would result in a one-week suspension; others testified that they were advised an absence on February 16 would be cause for termination.

terminated on February 17, the Employer's list indicates that one employee was fired for "too many absences," two employees were fired for "poor attendance," two employees were fired for "insubordination," and twelve employees were fired for "no call no show." The list contains a dearth of detail, making it impossible to discern what behavior constituted too many absences, poor attendance, insubordination, or no call no show. Notably, the eighteen employees terminated for their participation in the "Day Without Immigrants" are the only listed employees whose cause for termination includes the reason "sabotage."

The original unfair labor practice charge was filed on February 21 and served on the Employer the next day. Almost a month later, on or about March 8, Assistant Manager had breakfast with one of the discharged employees who was a personal friend of (b) (6), (b) (7)(C) During the breakfast, Assistant Manager asked the former employee about the employees' charge, the identification of the lawyer helping them, and where they went for help. The employee did not respond to those inquiries. Assistant Manager then advised the employee that the owners of Employer had good lawyers and that "they wanted the employees to go to court so they could throw them out by immigration." The employee responded that the owners were bad for wanting to hurt the employees in that way. Assistant Manager stated that the employees would not be able to do anything or defend themselves and that, therefore, the Employer was not worried. An amended charge regarding this incident was filed on March 20 alleging that the Employer, via Assistant Manager, threatened to report the discharged employees to immigration services.

II. 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.[6] Many businesses closed for the day in solidarity with their immigrant laborers or as a practical necessity because they were short-staffed.[7]

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[6] *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.

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.[8] Consistent 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.[9] 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.[10] 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.[11]

16, 2017, *available at* https://www.nytimes.com/2017/02/16/nyregion/day-without-immigrants-boycott-trump-policy.html (grassroots "boycott" and "protest").

[7] *See, e.g.*, Robbins & Correal, *supra* note 6.

[8] 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).

[9] 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").

[10] Exec. Order No. 13768, 82 Fed. Reg. at 8800.

[11] 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)

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.[12] To many, the raids signaled a new, more aggressive crackdown on undocumented immigrants, and validated fears that bystanders without criminal records would not be spared if they happened to be present during a raid.[13] As a result of these raids, many immigrants became fearful of going to work.[14] The raids

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(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.").

[12] *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.

[13] *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 (arrests of immigrants with no criminal record more than doubled in early 2017 as compared to same period in 2016).

[14] *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-

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.[15] Many had predicted that workplace apprehensions would play a vital role in meeting President Trump's goal of swiftly deporting millions of undocumented immigrants,[16] and anxiety about the possible revival of workplace raids appears to have been well-founded.[17]

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donald-trump-628896 ("many immigrants scared to take their children to school or to show up for work").

[15] Rein, *supra* note 12.

[16] *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* 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).

[17] *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; 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.

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by: threatening to suspend employees for participating in the "Day Without Immigrants," terminating eighteen employees who participated in the "Day Without Immigrants," which constituted a protected strike or, alternatively, discriminatorily applying its attendance policy to justify terminating those eighteen employees for engaging in protected concerted activity; and, interrogating a former employee about the terminated employees' legal representation before the Board. The Region should also allege that the Employer violated Section 8(a)(4) by threatening the immigration status of the terminated employees.

I. The Employees Engaged in Protected Concerted Activity within Section 7's Mutual Aid or Protection Clause

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

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."[20] 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.[21] For example, in *Kaiser Engineers*,[22] the Board held that a group

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[18] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

[19] *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))).

[20] *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).

[21] *Id.* at 565-67 (efforts to "improve working conditions through resort to administrative and judicial forums" and "appeals to legislators to protect their

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.[23]

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.[24]

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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))).

[22] 213 NLRB 752, *cited with approval in Eastex*, 437 U.S. at 566 n.16.

[23] *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).

[24] 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

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.[25] 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 immigration enforcement will likely cause employment standards and working conditions to deteriorate for all workers, especially in lower-wage industries.[26] 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.[27] 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.[28] Indeed, even documented immigrants may be reluctant to report

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which it was based was ill founded or not"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983).

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

[26] *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.

[27] *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.

[28] *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

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.[29] 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.[30] In light of these realities, workers participating in the "Day 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.[31] 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."[32] In addition, undocumented workers may feel so threatened by the possibility of workplace raids that they might limit their job search to so-called

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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").

[29] *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.

[30] *See* Domonoske, *supra* note 13; Kulish, *supra* note 13.

[31] *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").

[32] *See* Griffith, *supra* note 27 at 93-94.

"sanctuary" employers or jurisdictions that require employers to mitigate the impact of workplace raids on their employees.[33]

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 undocumented immigrants. 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.[34] Indeed, the Employer recognized the day of action as a work stoppage for the purpose of valuing immigrants' labor, since it attempted to convey to employees that they were important to the Employer and it was not at fault for the Trump administration's immigration policies.

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*,[35] 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

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[33] 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/.

[34] *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).

[35] 330 NLRB 47.

lawsuit to enjoin the union's activities.[36] 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.[37] Likewise, in *Tradesmen International*,[38] the Board 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,[39] 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.[40] 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.[41]

II. Whether the Discharges Were in Response to a Protected Strike or to Unexcused Absences, the Employer's Conduct Was Unlawful

Concluding that the employees' withholding of labor in support of the "Day Without Immigrants" constituted protected concerted activity is only part of the requisite analysis concerning the employees' discharges because "conduct with a protected object may nonetheless be unprotected because of the means employed."[42] The determination of whether the employees' conduct constituted a protected strike or unexcused absences impacts the standard used to evaluate the conduct.[43] We

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[36] *Id.* at 48, 50-51.

[37] *Id.* at 49.

[38] 332 NLRB 1158.

[39] *See id.* at 1162 (Member Hurtgen, dissenting).

[40] *Id.* at 1159-60.

[41] Indeed, President Trump's advisors anticipated bringing back workplace raids, in part, for the very purpose of displacing immigrants from their jobs. *See* Bennett, *supra* note 16.

[42] Memorandum GC 08-10, *supra* note 3, at 12.

[43] *Compare Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011) (clarifying that the judge erred in analyzing the 8(a)(1) discharge allegation under *Wright Line* because in cases in which employees are discharged for engaging in a protected work stoppage

conclude that the Employer unlawfully discharged the eighteen employees because their action on February 16 constituted a protected strike. Alternatively, even if the employees' conduct did not constitute a protected strike, the Employer nevertheless violated the Act by discriminatorily applying its attendance policy to terminate the employees for engaging in protected concerted activity.

a. The Employer Terminated Eighteen Employees for Engaging in a Protected Strike

Employees have a statutorily protected right to withhold labor from their employer in an effort to improve their terms and conditions of employment.[44] The Supreme Court has stated that the right to strike is a pillar of the collective-bargaining system, and "is to be given a generous interpretation within the scope of the labor Act."[45] Indeed, this generous interpretation is evident in Board decisions liberally finding strikes of unorganized workers protected,[46] as well as extending

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motive is irrelevant to the existence of an 8(a)(1) violation), *with Quantum Electric, Inc.*, 341 NLRB 1270, 1279 (2004) (analyzing the employees' work stoppage under *Wright Line* after finding that leaving work early to attend a union meeting did not constitute a strike). *See also CGLM, Inc.*, 350 NLRB 974, 974 n.2 (2007) (concluding the existence or lack of unlawful animus is not material when the very conduct for which the employees are disciplined is itself protected concerted activity) (quoting *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)).

[44] *See NLRB v. Drivers, Chauffeurs, Helpers, Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 (1960) (Section 13 "provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right . . . unless 'specifically provided for' in the Act itself"); *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, "employees are granted the right to peacefully strike, picket and engage in other concerted activities").

[45] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963) (noting that the "solicitude for the right to strike" is so strong that "when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail" so that the "positive command of S[ection] 13" be preserved).

[46] *NLRB v. Washington Aluminum*, 370 U.S. 9, 14-15 (1962) (employees' spontaneous work stoppage protected; having no bargaining representative and no established procedure for negotiating with the company, they took the most direct course to let the company know that they wanted a warmer place in which to work); *see, e.g.*, *Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees' joint cessation of work

Section 7 protection to a work stoppage regardless of whether a specific demand is proffered before, during, or even after a strike.[47] The right to strike is, of course, not without limitation.[48] Whether a work stoppage is protected depends, in part, on its purpose. To obtain protection, employees must be withholding labor to pressure their employer to remedy a work-related complaint or grievance.[49]

Although it's not entirely clear whether, in order to find a protected "strike," the employer must in fact be able to remedy the employees' work related complaint, in *Eastex* the Supreme Court suggested in dicta that an employer should have some degree of control over resolution of the objective of striking employees in order for the application of economic pressure to fall within the Act's protection.[50] Following the 2006 "Day Without Immigrants," General Counsel Meisburg adopted the Supreme

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to protest perceived safety violations and inadequate health insurance coverage protected, especially where there was no bargaining representative, notwithstanding the reasonableness of their perception, any lack of notification to the employer of their intent to cease work, or the existence of alternative methods of solving the problems); *Polytech, Inc.*, 195 NLRB 695, 696 (1972) (noting that employees were unrepresented and lacked "structured procedures to protest . . . working conditions" in finding single concerted refusal to work overtime protected).

[47] *Washington Aluminum*, 370 U.S. at 14 (employees' work stoppage protected despite failure to make specific demand upon employer to remedy objectionable condition).

[48] For instance, strikes that are unlawful, violent, or in breach of contract are not protected. *Id.* at 14-17 (employees' strike did not include illegal conduct that would have made it lose the Act's protection, which superseded employer's plant rules).

[49] *See, e.g.*, *New York State Nurses Assn.*, 334 NLRB 798, 800 (2001) (nurses' concerted refusal to volunteer for overtime work was strike because it was "intended to put pressure on the [employer] to change its staffing practices") (citing *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978)); *cf. Quantum Electric, Inc.*, 341 NLRB at 1279 & n.29 (leaving work early to attend union meeting was unprotected where not intended as protest of working conditions); *Bird Engineering*, 270 NLRB 1415, 1415 n.3 (1984) (noting that workers' protest against the employer's new on-campus lunch policy might have been protected had they engaged in a proper work stoppage, rather than merely violating the new rule).

[50] *Eastex, Inc.*, 437 U.S. at 568 n.18 (quoting Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U.PA.L.REV. 1195, 1221 (1967) ("The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.")).

Court's suggestion and concluded that while the purpose of the 2006 "Day Without Immigrants"—to protest proposed legislation affecting the employment of undocumented immigrants—was protected under the mutual aid or protection clause of Section 7, the employees' means of achieving that protected purpose—withholding their labor—was not a protected "strike" because employees' underlying grievance concerning the proposed legislation was not one that their employers could remedy.[51]

More recently, in *Nellis Cab Company*, the Board acknowledged the Supreme Court's dicta in *Eastex* that an employer should have some degree of control over the outcome of a political dispute for economic pressure in support of that dispute to be protected.[52] Without explicitly agreeing with the Court's suggestion, the *Nellis* Board concluded that the employer taxicab company had some control over whether a state agency issue more taxi medallions because the employer, along with the other fifteen local taxicab companies, could influence the state agency's decision.[53] Therefore, the taxicab drivers' brief protest in opposition to the increase in medallions, during which the drivers refused to pick up passengers, was a protected strike designed to "influence the influencers."[54]

In this case, the eighteen employees who withheld their labor in support of the "Day Without Immigrants" were engaged in a protected strike because they sought to improve working conditions affected by the administration's immigration policies and the Employer had some degree of control over those working conditions. As discussed above, the purpose of the employees' protest was to highlight and counteract the negative impact President Trump's administration is having on the job security, workplace standards, and employment opportunities for documented and undocumented immigrant employees.[55] Although not formally presented to the

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[51] Memorandum GC 08-10, *supra* note 3, at 10.

[52] 362 NLRB No. 185, slip op. at 2 (Aug. 27, 2015).

[53] *Id.,* slip op. at 2 & n.11 (noting the Supreme Court's acknowledgement that "Congress entrusted to the Board, 'in the first instance,' the task of delineating the boundaries of the 'mutual aid or protection' clause.").

[54] *Id.* slip op. at 2.

[55] *See supra* pp. 10-12; National Immigration Law Center, Understanding Trump's Executive Order Affecting Deportations & "Sanctuary" Cities (last revised Feb. 24, 2017) (highlighting how President Obama's policy focused predominantly on criminals and gang affiliated undocumented immigrants in stark contrast to President Trump's desire to deport "virtually any removable noncitizen"); *ICE Arrests 600 in Nationwide Raids After Trump Order Expands Criminalization of Immigrants*, (Democracy Now!

Employer in a strike notice, the Employer was aware that the purpose of the protest was to improve the working conditions, and overall standing, of its predominantly immigrant workforce. Notably, these employees are not only unorganized, but any chance of opening a dialogue with the Employer about their workplace concerns is even more difficult because of the language barrier.[56] Thus, the employees' best, and arguably only, option to express their grievances was to withhold their labor in support of the "Day Without Immigrants" and pressure the Employer to take action to insulate its workplace from the threat of job loss resulting from work raids and deportations.

We reject the Employer's argument that it does not have control over resolution of the employees' concerns. The Employer has a number of options that it could implement that would improve the working conditions of its employees. For example, the Employer could pledge that it will neither call ICE to investigate its employees, nor use its employees' immigration status as a vulnerability to extort.[57] In the event ICE attempts to investigate or raid its workplace, the Employer could refuse to permit ICE to enter its property or search its files unless and until a warrant or subpoena is produced,[58] upon which the Employer could proactively limit ICE's

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Feb. 13, 2017) (interviewing President of the California State Senate Kevin de León, who stated "I can tell you half of my family would be eligible for deportation under the executive order, because if they got a false Social Security card, if they got a false identification, if they got a false driver's license prior to us passing AB 60, if they got a false green card—and anyone who has family members, you know, who are undocumented knows that almost entirely everybody has secured some sort of false identification. That's what you need to survive, to work").

[56] *See supra* note 46 (discussing the Board's broad interpretation of strike and willingness to find strikes of unorganized workers protected).

[57] Sophia Tareen, *Restaurants Nationwide seek 'Sanctuary' Status for Immigrant Employees*, PBS NEWSHOUR (Jan. 25, 2017) http://www.pbs.org/newshour/rundown/restaurants-nationwide-seek-sanctuary-status-immigrant-employees/ (employers are reaffirming their adherence to anti-discrimination policies and creating safe spaces for their employees in an effort to alleviate fear of deportation and other harassment); *Oakland May Call for Employers to Establish Sanctuary Workplaces*, CBS SF (Apr. 18, 2017) http://sanfrancisco.cbslocal.com/2017/04/18/oakland-city-council-sanctuary-workplaces-proposal/ (proposing a resolution that will force employers to respect and refrain from threatening their workers' immigration status).

[58] Davis Bae, *How to Prepare for an ICE Raid on your Workplace*, FAST COMPANY (Mar. 10, 2017), https://www.fastcompany.com/3068857/how-to-prepare-for-an-ice-

search to the strict confines of that document to minimize exposure to its workforce and prevent collateral arrests.[59] Further, the Employer could serve as a conduit between its employees and immigrant or legal aid groups so that employees can learn about their rights and how to best protect themselves if confronted by ICE.[60] The Employer could publically denounce the administration's actions and advocate for more liberal immigration policies. The Employer could also publicly designate itself a so-called "sanctuary" employer.[61] Thus, although the Employer does not personally control the administration's immigration agenda, it could take a stand with hundreds of other companies and thereby influence the administration to change course just as the Board found cab companies could sway the state agency's determination in *Nellis Cab Company.*[62] Indeed, the very fact that the Employer threatened the immigration status of the discharged employees in the aftermath of the strike establishes that the Employer was well aware of the impact it could have on the working conditions of its workforce.

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raid-on-your-workplace (providing steps employers should take in the event of an ICE raid); Michael H. Neilfach & Amy L. Peck, *What Employers Need to Know about Immigration Raids on Their Premises*, JACKSON LEWIS (Mar. 29, 2017), https://www.jacksonlewis.com/publication/what-employers-need-know-about-immigration-raids-their-premises (same).

[59] Bae, *supra* note 58; Neilfach & Peck, *supra* note 58.

[60] Neilfach & Peck, *supra* note 58.

[61] 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/.

[62] *Nellis Cab Co.*, 362 NLRB No. 185, slip op. at 2.

b. The Employer's Discriminatory Application of its Attendance Policy to Justify Termination of Employees Engaged in Protected Concerted Activity was Unlawful

In the alternative, even if the employees' participation in the "Day Without Immigrants" did not constitute a strike, the Employer's termination of the eighteen employees violated the Act because the Employer applied its attendance policy discriminatorily in order to justify terminating the employees for engaging in protected concerted activity. To establish a violation under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employees were engaged in protected concerted activity, the employer had knowledge of such activity, the employer exhibited animus or hostility toward that activity, and the employees' protected activity was a "motivating factor" in the employer's decision to take adverse action against them.[63] An employer's discriminatory motive may be established by both direct and circumstantial evidence, including: (1) the timing of the adverse action in relation to the employee's protected activity; (2) other unfair labor practices, statements, and actions showing the employer's discriminatory motivation; and (3) evidence demonstrating that the employer's proffered explanation for the adverse action is pretextual.[64] Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the employees' protected concerted activity.[65]

Here, the General Counsel can meet his initial burden. As previously analyzed, the employees engaged in protected concerted activity for their mutual aid or protection when they participated in February 16's "Day Without Immigrants." The Employer was aware both of the employees' plans and motivation to participate in the protest, as evidenced by the Manager and Owner's instructions to Assistant Manager to inform the employees that it could do nothing about the administration's immigration policies. After learning of the employees' plans, the Employer demonstrated animus towards the protected concerted activity in several respects. First, the Employer warned its employees that there would be adverse consequences

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[63] *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981). *See also Approved Electric Corp.*, 356 NLRB 238, 238-40 (2010) (applying *Wright Line* analysis to find discharges violated Section 8(a)(1)).

[64] *Real Foods Co.*, 350 NLRB 309, 312 n.17 (2007); *Wright Line*, 251 NLRB at 1090.

[65] *Wright Line*, 251 NLRB at 1089.

for participating in the "Day Without Immigrants."[66] Second, the Employer terminated the eighteen employees the day after they engaged in protected concerted activity, including, in part, for engaging in "sabotage." The Employer failed to explain how the eighteen employees' absence from work on February 16 constituted "sabotage." Notably, the eighteen employees are the only ones listed in the Employer's evidence to have ever been terminated for that reason, suggesting that the Employer considered the employees' concerted attempt to improve working conditions to be a personal, willful attack intended to harm it, which warranted disparate treatment from other previously discharged employees. Finally, Assistant Manager's post-discharge threat to report the employees to ICE further proves the Employer's motivating animus at the time of the termination.[67]

The burden then shifts to the Employer, and we conclude that the Employer cannot establish that it would have terminated the eighteen employees absent their protected concerted activity. The only evidence the Employer presented was a list of employees ostensibly demonstrating that several had been discharged pursuant to the Employer's unwritten attendance policy in the past. But the list merely contains the name, position, and reason for termination and contains no information that would serve as a persuasive rebuttal to the General Counsel's prima facie case. Moreover, employees have testified that the Employer does not have a history of strictly enforcing its attendance policies and that some have not sought permission, given advance notice before an absence, or provided the Employer with documentation upon their return to work. Even employees who have personally sought permission or given advance notice acknowledged that others received no repercussions for their failure to do so. Finally, the Employer's pretext is further demonstrated by the fact that all of the employees who protested were discharged for (among other reasons) "no call/no show" even though some employees did provide advance notice of their absences —i.e., some employees told Assistant Manager on February 15 that they would not be reporting to work the next day and one employee texted [redacted] supervisor on February 16 that [redacted] would be absent that day. This evidence demonstrates that the Employer discharged the eighteen employees for engaging in protected concerted

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[66] While there is some debate as to whether employees were threatened with a one-week suspension or a termination, both adverse actions indicate the Employer sought to dissuade the employees from exercising their right to engage in protected concerted activity.

[67] The Board recognizes that later unlawful conduct or evidence of animus can demonstrate the motivation behind an employer's earlier conduct. *See, e.g.*, *Jenks Cartage Company*, 219 NLRB 368, 369 (1975) (ALJ, affirmed by the Board, found that employer's subsequent statement to an employee was relevant and material in assessing its motive for discharging another employee two days earlier).

activity and not because of their unexcused absences.[68] Therefore, because the Employer has failed to meet its burden under *Wright Line*, we conclude that the Employer's animus was a motivating factor in its decision to terminate the eighteen employees in violation of Section 8(a)(1).

III. The Employer Interrogated a Discharged Employee in Violation of Section 8(a)(1) and Threatened Discharged Employees in Violation of Section 8(a)(4)

We agree that the March 8 conversation between Assistant Manager and a discharged employee included an unlawful interrogation that violated Section 8(a)(1) because the Assistant Manager questioned the employee about the Charging Parties' unfair labor practice charge without giving the employee specific assurances, including that [redacted] cooperation with the Employer was strictly voluntary.[69] The fact that the interrogation happened during an informal lunch between friends does not negate its coercive effect.[70]

We also conclude that Assistant Manager's subsequent threat regarding the employees' immigration status in response to their charge filed with the Board violated Section 8(a)(4). "Preserving and protecting access to the Board is a fundamental goal of the Act, as reflected in Section 8(a)(4)."[71] Of the various ways in

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[68] *Compare Quantum Electric, Inc.*, 341 NLRB at 1279 (ALJ, affirmed by Board, applied *Wright Line* and concluded that employer lawfully terminated employees for leaving work early to attend union meeting where employees did not leave work out of protest, there was no evidence of employer animosity or discriminatory motive, and employer enforced its attendance policy strictly and did not tolerate unauthorized absences).

[69] *See Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965). *See also Beverly Health and Rehabilitation Services, Inc.*, 332 NLRB 347, 349 (2000) ("Failure to inform employees of the voluntary nature of the employer's investigation is 'a clear violation' of Section 8(a)(1) of the Act."), *enforced*, 297 F.3d 468 (6th Cir. 2002).

[70] *Clinton Electronics Corp.*, 332 NLRB 479, 479-80 (2000) (affirming unlawful interrogation finding despite the supervisor and employee having a friendship outside of the workplace), *enforcement denied in relevant part*, 284 F.3d 731 (7th Cir. 2002); *see NLRB v. Big Three Industries Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978) ("[f]riends can unlawfully threaten their friends").

[71] *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 4-5 (Dec. 22, 2015) (citing *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (noting that the Board does not initiate its own

which employees may be coerced from filing an unfair labor charge, the Board is particularly vigilant when immigration issues are raised "as they are among the most likely to instill fear among employees."[72] The Board has held that threats and other conduct covered by Section 8(a)(1) can also violate Section 8(a)(4).[73] Assistant Manager's explicit warning that the employees were placing their immigration status in jeopardy if they followed through and took the Employer to court violated Section 8(a)(4) because such a blatant threat about deportation would dramatically affect the employees' willingness to continue to seek protection under the Act.

Accordingly, based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(a)(1) and 8(a)(4).

J.L.S.

ADV.07-CA-193475.Response.EZIndustrialSolutions.(b) (6)

proceedings; thus it is vital that all persons be completely free from coercion when filing charges with the Board).

[72] *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (discussing *Viracon, Inc.*, 256 NLRB 245, 247 (1981) (noting that immigration threats—which "undoubtedly evoke the most intense fear, not only of employment loss, but of removal from [employees'] very homes as well"—signals an employer's displeasure with concerted activity and the lengths it will go to thwart the employees' conduct)).

[73] *See, e.g.*, *Fuqua Homes (Ohio), Inc.*, 211 NLRB 399, 400-01 & n.7 (1974).