Several of our lab employees have voiced an interest in attending an upcoming, high-profile political rally. We got a notice from the hospital stating that no personal leave days — other than those already scheduled — would be permitted on that day, and that any employee absent on that day would have to provide a doctor’s excuse or face disciplinary action. Can the administration do that? Whatever happened to free speech?

Your question brings up a fairly common issue in leave management that every institution faces. What are the limits on employer restrictions of leave taking?

It is important to note that paid time off is not a protected right under federal law. It is largely governed by the contract, written or otherwise, between an employee and his employer. To determine whether this new policy violates contractual rights, check your employee manual. It should spell out the basic details of how leave is managed and how changes to leave policy can be made.

If the employer is savvy, the policy will probably indicate that personal leave needs to be scheduled in advance, and that administration has the right to modify leave policies, if it notifies employees in advance. If such provisions exist, it is likely that your employer has not exceeded his authority in announcing a new policy and imposing new restrictions. In the absence of such provisions, there might be room for legal argument about the new policy.

Some legal protections exist for employees leaving work for certain activities designed for “mutual aid and protection” under federal labor laws. These are the provisions that protect an employee’s right to strike, for example, but it is not clear how far these protections extend to other activities less directly connected to employment, such as political rallies. To some degree, we can expect this question to be clarified in the wake of cases brought after employees took time off work to attend recent rallies on behalf of illegal aliens.

Certainly, one body of law makes it clear that employers cannot prevent employees from participating in such activities on their own time and of their own volition. Another body of law makes it clear that employers often have a right to hire replacement workers for absent ones, even when the worker is away from the job for a legally protected reason, such as a sanctioned strike. As President Reagan proved with the air-traffic controllers, government employees in very sensitive positions can be fired for abandoning their work even if they are participants in a strike.

In situations where employees have skipped work despite warnings not to do so, employers usually claim that the employee is insubordinate and has abandoned his job — both generally solid grounds for termination. As long as there is not an overriding contractual provision (i.e., union rules), the employer may well be justified, unless leave is taken to attend a legally protected activity, such as a strike. Employers, however, are not allowed to selectively or more harshly discipline particular groups. In any case, a lawsuit would be necessary to determine whether or not the termination was justified, which would take months or years. Meanwhile, the employee is still terminated and in need of income.

It is not uncommon for employers to establish rules for leave-taking in order to minimize disruption to the workplace. To prevent excessive absenteeism, some employers do not permit employees to take time off near a holiday weekend unless it is scheduled and approved well in advance or is the result of a documented illness. Most such policies provide that the employee will be docked pay for the day rather than losing paid leave, but they also provide for escalating discipline in the face of repeated infractions.

It is important that the employer administer whatever discipline is warranted on the basis of the absence from work and the individual’s overall place in the disciplinary scale, not the reason for the absence. An employee who is away from work to attend a child’s school program is just as absent as one who stays home to participate in a protest march. If the employer’s concern is adequate staffing, delving into the reasons for absence — other than illness — only opens the door to charges of discrimination.

Termination is a harsh remedy and one reserved for repeated or serious infractions, such as insubordination and job abandonment. If an employee has been told to refrain from a particular activity on the job — in this case, being absent from work on a particular day — choosing to do so can constitute insubordination and abandonment of position. As for free speech, unless you work for a government employer, it is not generally as large a workplace issue as you might think. The constitution guarantees only that the government will not abridge your right to speak — not private employers. As long as the employer applies discipline appropriately and even-handedly against those who violate the published rules, it is not an issue here either.

Barbara Harty-Golder is a pathologist-attorney consultant in Chattanooga, TN. She maintains a law practice with a special interest in medical law. She writes and lectures extensively on healthcare law, risk management, and human resource management.