THE PUBLIC SECTOR

'Striking' trends at the NLRB and PERB

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The National Labor Relations Board's (NLRB) General Counsel's Office (GC) recently announced an effort to legitimize a form of strike that has historically been viewed as unprotected. That's important not only for California's private-sector employers but also for public employers under the jurisdiction of the California Public Employment Relations Board (PERB).

GC's policy switch

Strikes under the National Labor Relations Act (NLRA) are generally legal. However, two forms of particularly effective strikes—"intermittent" and "partial" strikes—have historically been excepted from that general rule. Last month, the GC issued an internal memorandum announcing its intent to legalize intermittent strikes while maintaining the prohibition against partial strikes.

The memorandum instructs GC field attorneys who are prosecuting or defending unfair labor practice cases involving intermittent strikes to take the position that such strikes are protected and lawful. The stated goal of the instruction is to persuade the NLRB and reviewing courts to create precedent that would clarify the distinction between intermittent and partial strike activity and, most important, deem intermittent strikes protected. The NLRB GC memorandum can be viewed at http://bit.ly/2fOWicZ.

What's the difference?

In advocating for the legality of intermittent strikes, the GC's memorandum differentiates between intermittent and partial strikes. The classic "intermittent" strike (also known as a "quickie" or "in-and-out" strike) involves multiple waves of short strikes. By contrast, the classic "partial" strike is a work "slowdown" or a "sit-down" strike in which employees, working in concert, remain on the job and draw their full pay but either refuse to perform tasks or continue working on their own terms. Partial strikes normally include an element of surprise with no prior notice given to the employer.

The difference between the two is that employees on partial strike are simultaneously retaining the benefits of working while withholding their services as a pressure tactic against the employer. But the two forms of strikes are similar in that they are both economic weapons intended to disrupt an employer's operations and pressure the employer into concessions without causing union members to suffer the same wage loss inherent in traditional strike situations. Also, both types of strike often include the element of surprise.

The memorandum presses the point that the legality of a strike shouldn't be measured by its impact—i.e., whether it harasses the employer into a "state of confusion." The GC emphasizes that employers can take countermeasures to defend against strikes, including locking employees out, hiring replacements, subcontracting, and relocating operations.

Public-sector ramifications

The GC's memorandum is of potential concern for California public-sector employers because PERB closely follows NLRB developments and, indeed, is even more union-oriented than the Obama NLRB.

Under almost all California public-sector labor statutes, "pre-exhaustion strikes"—strikes that occur before impasse procedures (i.e., mediation and fact-finding) are exhausted—are theoretically regarded as serious unfair practices and subject to an immediate court injunction effort by PERB. However, increasingly over the past few years, the labor-friendly PERB has roadblocked management efforts to prevent illegal strikes before they occur. That has had the practical effect of damaging public-sector operations and placing illegal pressure on management to accede to union demands.

The NLRB GC's efforts are likely to influence PERB and its GC, adding a new poison arrow to labor's already amply stocked quiver of strike tactics. As a result, we can anticipate more incidents of in-and-out strikes both before and after impasse procedures are exhausted.

The intermittent strike is intended to harm an employer's operations and pressure elected boards to cave to union demands. It provides an advantage for unions because employees who live paycheck to paycheck don't suffer the same high wage loss per pay period in an intermittent strike as they do in a prolonged strike. And so far, the sort of defensive measures available to employers in the private sector—such as

lockouts—haven't been deemed lawful in the California public sector.

PERB unfair practice strikes are on the rise

A related troubling development is worth noting. Case by case, unions are doing all they can to entice PERB to endorse their arguments that a pre-exhaustion strike was precipitated by the employer's unfair practices (i.e., "unfair practice strikes"). Indeed, we haven't recently seen a pre-impasse strike that a union has *not* characterized as an unfair practice strike.

That increases the time it takes PERB to investigate an employer's request for a strike injunction, thereby increasing the already high prospects that a strike will have occurred and had its destructive effect before PERB even decides whether to enjoin, or halt, the strike. It can also result in PERB's deciding not to enjoin a pre-exhaustion strike based on the pretext, or excuse, that it's an unfair practice strike. We can anticipate that unions will now use the cover of an "unfair practice strike" argument to legitimize pre-exhaustion intermittent strikes that can hobble agency operations.

Troubling tolerance for strikes imperiling public health and safety

PERB has also taken a troubling approach when addressing "health and safety" strikes—i.e., strikes that present a substantial and imminent risk to public health or safety. Such strikes are unlawful and unprotected even after impasse procedures are exhausted.

These days, rather than focusing on ensuring that such a strike doesn't occur, PERB has typically placed the burden on the employer to prove that it's unable to continue to provide health and safety services by using management personnel or replacement workers. In our view, that is at odds with the law because health and safety strikes are inherently illegal.

Bottom line

If the economy remains strong after the 2016 presidential election, we can anticipate increased union efforts to use intermittent strikes to pressure unionized public- and private-sector employers to accede to their demands. Given the outcome of the 2016 general election, however, it's not at all certain that this effort to liberalize the law will ultimately succeed. While PERB is regarded as more moderate than it was two years ago, we can expect the agency to be influenced by the NLRB GC's recent action.

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When a public-sector employer is confronted with the prospect of a strike under PERB's jurisdiction, it's important to get an early diagnosis of its defensive options to optimize the possibility of enjoining an illegal strike before it occurs.

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