Outline of the Law on Primary Strikes and Lock-Outs

A strike is an economic weapon to try to compel an employer to agree to union demands, or to protest an employer's unfair labor practices

> A strike is a "concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees" Section 501(2) of the Labor Management Relations Act (Taft-Hartley Act), 29 USC § 142(2).

By collectively withholding their labor, employees seek to pressure an employer economically to accede to demands regarding wages, hours, and other terms and conditions of employment, or to protest unfair labor practices committed by an employer.

During a strike, an employer may lawfully continue to operate its business with replacement employees

Depending on the circumstances and balance of power in a particular strike:

> An employer may lose revenue from the curtailment of business operations
>
> Employees lose wages and benefits for duration of a strike
>
> Employees may be temporarily or permanently replaced during a strike

Legal Protections and Restrictions on Strikes

Special restriction for strikes and picketing at health care facilities:

> "A labor organization before engaging in any strike, or picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation & Conciliation Service of that intention.... The notice shall state the date and time such action will commence. The notice, once given, may be extended by the written agreement of both parties." Section 8(g) of the National Labor Relations Act, as amended by the Health Care Institutions Amendments, 29 USC § 158(g).

Right to engage in concerted activities

> "An employee shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." Section 7 of the National Labor Relations Act, 29 USC § 157.

A few examples of "concerted activities" protected by law include your right to attend a union meeting, to wear a union button or other insignia at work, to talk to your co-workers (in non-work areas on non-work time) about union-related matters, to distribute leaflets about a labor dispute, or to collectively raise complaints to your employer about working conditions. Except under "special circumstances," your employer is legally prohibited from retaliating against you for engaged in these concerted activities. *Republic Aviation Corporation*, 324 U.S. 793 (1945)

A strike involving a labor dispute between an employer and the striking employees constitutes a "concerted activity for the purpose of collective bargaining or other mutual aid or protection."

A strike can be declared for a pre-determined length of time, or it may be initiated for an indefinite duration – until the employer concedes the strikers' demands or the strikers abandon the strike.

An employer is not required to permit strikers to use their accrued vacation time or other benefits during a strike unless they are otherwise entitled to do so. *National Labor Relations Board v. Great Dane Trailers, Incorporated*, 388 U.S. 26 (1967); *Gulf Envelope Com*pany, 256 NLRB 320 (1981)

Unless an employee engages in "strike misconduct" – generally, acts or threats of violence or destruction of the employer's property, *National Labor Relations Board v. H.N. Thayer Company*, 213 F.2d 748 (1st Cir. 1954), *certiorari denied* 348 U.S. 883 (1954) – the employer may not legally fire or discipline or otherwise retaliate against an employee for participating in a legal strike.

Unprotected strikes generally include:

* Strikes that violate a collective bargaining agreement. *National Labor Relations Board v. Sands Manufacturing Company*, 306 U.S. 332 (1939)

* Sit-down strikes (strikers occupy the workplace). *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939)

* Partial strikes, such as slowdowns or refusals to work mandatory overtime or mandatory on-call assignments. *C.G. Conn Limited v. National Labor Relations Board*, 108 F.2d 390 (1939)

* Intermittent strikes (a planned series of strikes of short duration). *Pacific Telephone & Telegraph Company*, 107 NLRB 1547 (1954); *U.S. Service Industries*, 315 NLRB 285 (1994), *enforced* 72 F.3d 920 (D.C. Cir. 1995)

* Strikes by a minority of the employees in a bargaining unit without the authorization of their union. *Western Cartridge Company v. National Labor Relations Board*, 139 F.2d 855 (7th Cir. 1943)

When employees engage in a strike to protest unfair labor practices committed by the employer – such as threats to coerce employees to refrain from union activity, or spying on employees' union activities – the employer may only hire temporary replacement workers, and when the strike ends the employer must promptly reinstate the strikers to their former positions. *National Labor Relations Board v. International Van Lines*, 409 U.S. 48 (1972); *Mastro Plastics Corporation v. National Labor Relations Board*, 350 U.S. 270 (1956)

However, the U.S. Supreme Court has ruled that when employees engage in a strike in an effort to compel the employer to agree to their economic demands (such as union recognition, higher wages or better working conditions), the employer may legally hire other workers to permanently replace the strikers. *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938).

At the end of an economic strike, when the union on behalf of the employees makes an unconditional offer to return to work, the employer does not have to reinstate the strikers. The employer has no obligation to discharge the replacement workers and is only required to place the strikers on a rehire list with preferential recall rights. So while the strikers are not fired and technically remain "employees" for certain legal purposes, they do not have a job or any income.

Possible Employer Tactics

Lock-out – An employer withholds employment from its employees for the purpose of pressuring the union to agree to the employer's economic demands.

Depending upon circumstances, an employer may lawfully lock out employees and continue to operate its business by hiring temporary replacement workers. *National Labor Relations Board v. Brown Food Stores*, 380 U.S. 278 (1965)

An employer's unilateral implementation of its last, best and final offer – If the union and the employer have reached a genuine "impasse," or stalemate in negotiations – in which, after good faith bargaining, there are irreconcilable differences in the parties' positions and the parties are unwilling to compromise, so further bargaining would be futile at that time – an employer may lawfully implement changes in wages, hours, and other terms and conditions of employment by unilateral action. *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962)