

# Federal Labor Laws

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## Part Five: Regulation of Economic Pressure

### XXIV. Limitations on the Right to Strike and to Use Other Forms of Concerted Activity

#### A. The Use of Economic Power in Labor Disputes

1. The fundamental source of power of workers over their wages and working conditions is the power to withhold their labor. While the right to strike has long been regarded by workers as a basic and fundamental right, the legal community has been very narrow in its recognition of the right to strike.
2. The success of any strike is primarily a function of power, not of legal right. The law is significant in strike issues because it distributes power, by sanctioning or outlawing the use of particular tactics. Historically, this distribution of power by the legal community has served to undermine the power of unions through tight regulation of the use of economic pressure.
3. The legal treatment of economic weapons depends on a number of considerations, including the nature of the activity, the goals or objectives of the pressure, and the extent to which "neutral" employers, unions or consumers are involved in the dispute.
4. This outline identifies the major categories of economic pressure and discusses the broad issues raised by each category.

#### B. Legal Restrictions on the Right to Strike

1. Section 13 of Taft-Hartley states that  

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.<sup>1</sup>
2. Despite this nominal recognition of the right to strike, the Taft-Hartley Act contains extensive limitations on the right to strike and on the rights of strikers.
3. As it has developed, Taft-Hartley applies an ends/means test for determining whether a strike is illegal or unprotected. As a general

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<sup>1</sup> 29 USCA § 163.

rule, strikes are illegal if the union seeks to achieve improper goals or if improper tactics are used.

- a. Strikes to obtain illegal or permissible subjects of bargaining would be examples of strikes that are prohibited because the goal is illegal.
  - b. Strikes lose legal protection if unlawful tactics are used. For example, sit-down strikes are unprotected.<sup>2</sup>
  - c. Part of this analysis requires a balancing of the “property” interests of the employer with those interests the NLRA provides workers.
    - i. An interference with the property rights of the employer may result in a legal termination of the employment relationship.
    - ii. Under the Act the task of the Board is to resolve conflicts between § 7 rights and private property rights and seek accommodation between the two; But what is a “proper accommodation” in any situation may largely depend upon the content and context of the § 7 right being asserted.<sup>3</sup>
    - iii. Section 7 expressly recognizes the right of employees “to engage in concerted activities” but does not and can not confer upon them the right to engage in unlawful activities.<sup>4</sup>
4. In addition to restrictions imposed by Taft-Hartley, the Anti-Injunction Acts (Norris-LaGuardia and similar state legislation) are important for determining the ability of the union to maintain a strike without court intervention.
  5. A major limitation on the right to strike is the interpretation of the Section 7 concept of protected activity. An employer retains the right to discipline workers who engage in activity which is unprotected. Thus, workers who are engaged in wildcat strikes,<sup>5</sup> strike or picket misconduct,<sup>6</sup> or other tactics which exceed the

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<sup>2</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

<sup>3</sup> *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

<sup>4</sup> *Home Beneficial Life Ins. Co. v. N.L.R.B.*, 159 F2d 280 (4<sup>th</sup> Cir. 1949).

<sup>5</sup> *NLRB v. Sands Manufacturing Co.*, 306 U.S. 332 (1939), but also see *Mastro Plastics Corp. v. NLRB*, 214 F2d 462 (2<sup>nd</sup> Cir. 1954), where a wildcat strike was allowed due to employer committing ULP.

<sup>6</sup> See, *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990) for current test weighing magnitude of misconduct and decision to rehire strikers.

standards of permissible conduct under Section 7 may be disciplined.

6. The balancing test use by the Board and courts in interpretation of employer defenses to §8(a)(1) charges also limits the right to strike. The Supreme Court recognition of the right of the employer to replace strikers clearly represents a practical, if not legal, limitation on the right to strike. The distinction between being replaced and being terminated for exercising the right to strike is a dubious one for the worker affected.
7. Public sector workers face more dramatic restrictions on the right to strike. Most states and the federal government restrict or prohibit public sector strikes. The federal government, for example, has the right to terminate strikers and revoke the bargaining rights of a union involved in a strike.<sup>7</sup>

### **C. Classification of Strikes and Lockouts**

1. A strike is simply a concerted refusal to work. However, for determining the legality of a strike, the Board and courts have developed a number of more specific classifications of strike activity.
  - a. Strikes are classified as either economic or unfair labor practice strikes, depending on the cause of the walkout. If a strike is caused by or prolonged by the unfair labor practices of the employer, it is considered an unfair labor practice strike.<sup>8</sup> Strikes caused by disputes over wages or working conditions are considered economic.<sup>9</sup> An economic strike can be turned into an ULP strike if the employer commits ULPs during the strike.<sup>10</sup>
  - b. Strikes may be unlawful if the objectives of the strike or the strike tactics are unprotected. In addition, the right to strike may be waived by the collective bargaining agreement limits the right.<sup>11</sup>
  - c. A strike directed against an employer with whom the union has a dispute is a primary strike, while a strike against the customers, suppliers or other employers which are not

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<sup>7</sup> *PATCO v. FLRA*, 672 F.2d 109 (D.C. Cir. 1982).

<sup>8</sup> See, e.g., *Pecheur Lozenge Co.*, 98 NLRB 496 (1952) where upon an unconditional offer to return to work, the strikers are entitled to their former jobs.

<sup>9</sup> *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), establishing the employer's right to hire permanent replacements for economic strikers.

<sup>10</sup> See, *American Cyanamid Co.*, 235 NLRB 1316 (1978), enforced, 592 F.2d 356 (7<sup>th</sup> Cir. 1979).

<sup>11</sup> E.g., *Electrical Workers (UE) Local 1113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955).

directly involved in the underlying dispute are secondary strikes.

- d. Concerted refusals to work because of the presence of abnormally dangerous conditions of work are considered safety disputes under Section 502 of Taft-Hartley,<sup>12</sup> which extends limited protection to this form of concerted activity.
  - e. A worker who honors a picket line is known as a sympathy striker because the worker is refusing to work in sympathy with other workers who are engaged in a labor dispute.<sup>13</sup>
2. Since a strike is a concerted refusal to work, generally the refusal to work by a single worker, acting alone, is not a strike.<sup>14</sup>
  3. Lockouts by an employer are treated in much the same manner as strikes. Lockouts are classified as defensive or offensive, depending on the objective of the employer.
    - a. An employer who uses the lockout to attempt to get the union to accept the employer's bargaining proposals has engaged in an offensive lockout.<sup>15</sup>
    - b. A defensive lockout is one in which the objective of the employer is to control the timing of a work stoppage. If the employer anticipates a strike and responds by first locking the workers out, the lockout is defensive.<sup>16</sup>

#### **D. Picketing and Handbilling Issues**

1. While strikes and pickets are usually closely associated, they are distinct tactics subject to different levels of regulation. As with strikes, picketing may be unlawful if either the objective or the tactics of the picketing is unprotected. Major categories of picketing activity include:
  - a. A very broad category of picketing is common situs picketing, in which one union seeks to picket a work location at which two or more employers are engaged in business.

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<sup>12</sup> 29 U.S.C. § 143.

<sup>13</sup> E.g., *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), but see *Con-Way Central Express*, 305 NLRB 837 (1991) for permanent replacement of sympathy striker due to employer's corresponding right to operate his business.

<sup>14</sup> See, e.g., *Lin R. Rogers Electrical Contractors*, 323 NLRB 988, (1997).

<sup>15</sup> See, e.g., *Kinney Drugs*, 314 NLRB 296 (1994).

<sup>16</sup> See, *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

Because of the secondary effects of such picketing, it is tightly regulated by §8(b)(4) of Taft-Hartley.<sup>17</sup>

- b. A picket is occasionally used to apply pressure on an employer to recognize a union. This form of organizational or recognition picketing is regulated by §8(b)(7).
  - c. It is generally legal for a union to use a picket to inform the public that an employer does not pay wages<sup>18</sup> or provide conditions which meet standards for the industry and area.<sup>19</sup> This form of activity is known as "area standards" picketing.
2. Handbilling is a form of concerted activity which enjoys broad protection because it approaches the level of Constitutionally protected free speech.<sup>20</sup>

## **E. Consumer Appeals and Boycotts**

1. Appeals to consumers and other customers of the employer's product to refrain from purchasing the product may be effective methods of pressuring the employer to resolve a labor dispute. However, there are very specific restrictions on the use of boycotts as a source of economic pressure.
  - a. Direct appeals to consumers asking that they not buy the product of a boycotted employer are broadly protected as long as picketing to enforce the boycott is not used.
  - b. A product boycott is one in which the appeal to consumers is to refrain from purchasing the struck product.<sup>21</sup>
  - c. A total boycott is one in which consumers are asked not to patronize businesses which sell the struck product.<sup>22</sup>
  - d. A merged product boycott is an appeal to consumers asking that they not purchase a product in which the struck product is a component.<sup>23</sup>

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<sup>17</sup> *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).

<sup>18</sup> See, e.g., *Building & Construction Trades Council (Yuba, Sutter & Colusa Counties)*, 189 NLRB 450 (1971).

<sup>19</sup> See, e.g., *Alton-Wood River Building & Construction Trades Council (Jerseyville Retail Merchants Association)*, 144 NLRB 526 (1963).

<sup>20</sup> See, *Teamsters Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), but compare *Lumber & Sawmill Workers Local 2797 (Stolze Land & Lumber Co.)*, 156 NLRB 388 (1965).

<sup>21</sup> *Fruit & Vegetable Packers Local 760 (Tree Fruit Labor Relations Committee, Inc.)*, 132 NLRB 1172 (1961).

<sup>22</sup> *Retail Clerks Local 1001 (Safeco Title Insurance Co.)*, 226 NLRB 754 (1976).

2. Section 8(e) adds very specific limitations on a form of boycott known as hot cargo disputes. Hot cargo agreements are arrangements under which the workers of one company refuse to handle the work of another. They are boycotts by workers rather than by consumers. With limited exceptions, hot cargo arrangements are unlawful.<sup>24</sup>

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<sup>23</sup> See, e.g., *Teamsters Local 327 (American Bread Co.)*, 170 NLRB 91 (1968).

<sup>24</sup> See, *Newspaper & Mail Deliverers of N.Y. (Hudson County News Co.)*, 298 NLRB 564 (1990).