

LABOR LAW

2022 could be the year of the strike

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Going into spring 2022, the continued devastation of COVID-19 and the physical, emotional, and societal tolls it has caused are only part of the dilemma facing society, employers, and employees. The economy, inflation, the politicization of vaccines and masks, high vacancy rates, a mobile workforce emerging from two years of isolation, and the severe trauma experienced by millions of healthcare workers contribute toward a challenging and unstable situation for employers.

Emerging (we hope) from the pandemic, unions are making up for lost ground: extending their organizing drives into previously impermeable territories (witness Amazon, Starbucks, and Google), invoking both bread-and-butter issues and challenging societal issues—including such distant cousins as COVID protections and DEI (diversity, equity, and inclusion) principles—to show their relevance to modern workers. And in unionized workplaces, unions are pressing for higher wages and better benefits to address inflation.

An example of that approach regarding California's nonprofit sector is a union's announced goal of organizing workers to address "long-standing abuses of power that have led to unstable working conditions, including a lack of organizational transparency, discriminatory hiring and promotional practices and an absence of accountability." Another common mantra is a pitch for "equal voice, strong representation, and a seat at the table of decision-making," even in workplaces where employer-employee relations are good.

All told, workers sequestered for two years are searching for camaraderie, and with today's abundance of job opportunities, the fear factor that often constrains concerted activity has receded. Unions are seizing the moment; what better way to show solidarity's collective muscle than a righteous strike?

Recent strike conduct

Beyond a show of solidarity, California public-sector strikes have varied both in their purposes and in their degree of union involvement, with healthcare providers seeing the most increases in strike activity. Unions have used strikes both to influence negotiations and to respond to alleged unfair labor practices. As we enter spring negotiations in various locales, unions are already buttressing bargaining demands with threats of strikes. It is not too early, therefore, for an alert about the challenges coming to public employers who may soon be facing strike threats.

Public-sector challenges

With most of the California public sector already unionized, 2022 has already witnessed significant public-sector strike activity. Some of this activity stems from protests by workers, teachers, and students in connection with deficient COVID-19 prevention protocols and inadequate personal protective equipment (PPE), including masks and tests. But as public-sector collective bargaining gears up for its traditional launch in early spring, threats of more traditional strikes are coming in.

What sets apart public-sector strikes from those in the private sector is that in strike situations, California public-sector unions have a strong and reliable ally in the Public Employment Relations Board (PERB), which oversees the collective bargaining network in California. That's bad news for employers.

Legality of public-sector strikes: a nutshell

Strikes by police and firefighters are illegal, as are strikes that create a substantial and imminent risk to public health and/or safety. Strikes by other personnel are not per se illegal; instead, the legality depends on whether the specific positions at issue are "essential" to prevent a substantial and imminent threat to public health and safety. This analysis is done in a piecemeal manner by PERB, considering each position in detail to determine whether it is essential.

The timing of the strike may also affect its legality.

Most public-sector strikes arise in the collective bargaining realm. Strikes occurring before the negotiations and impasse process are complete are unlawful and should ordinarily be stopped by court action taken by PERB. Strikes provoked by serious unfair practices by the employer may be exempt from this rule, but the majority of strikes seek to assert economic pressure rather than to protest illegal employer conduct.

PERB also previously had a low tolerance for surprise strikes, cautioning that unions should give adequate notice of strike activity. Employees that directly deliver healthcare services must give adequate notice before striking, but PERB has not adopted the National Labor Relations Act's (NLRA) clear-cut requirement of 10 days' notice for strikes affecting healthcare workers.

PERB 'preemption'

Because PERB is the major player in regulating strike conduct, an important question is whether it can stop employers from seeking court relief, forcing them to first ask PERB for help. The long-standing principle of labor law preemption answers that question. PERB has the authority to enjoin any public-sector strike—i.e., to go to court and get a court order preventing or limiting a strike. PERB retains exclusive initial jurisdiction over conduct that is arguably prohibited or arguably protected by board statutes, so employers and unions can't ordinarily bypass PERB and go straight to court on labor issues. Instead, they must resort to the board's administrative processes except in very unusual circumstances—i.e., when resorting to PERB would be ineffective or cause irreparable harm. That is a very high bar.

Case in point

In the beginning of the pandemic, the California Nurses Association (CNA) called a strike against the San Joaquin County Hospital—the healthcare provider of last resort to thousands of county residents. The union gave 10 days' notice of the strike. The county contracted for replacement workers and did its best to plan for the strike. After receiving the strike notice, the county had

to convince PERB and the union to exempt nurses who were essential to avoid substantial risks to health and safety—a daunting assignment because of the high standard PERB applies before agreeing that workers should be exempt on that basis.

Even though it was the CNA that called the strike, the strike gave the Service Employees International Union (SEIU) leverage in bargaining due to the specter that the SEIU would join (unlawfully) in sympathy for the nurses. The SEIU refused to assure the county it would not join the strike and claimed it had no intent to strike, so PERB rejected the county's request for help. The SEIU refused to commit to give notice of a sympathy strike, and all evidence supported that a strike by the union was imminent, so the county went to court for relief. PERB intervened—invoking preemption—and took the union's side in court. The SEIU then called a sympathy strike on less than 24 hours' notice. The county had to manage delivery of patient care as two unions used the strike to gain traction in bargaining.

Counting the ways

Why do employers feel they have no ally in PERB in strike situations? Let us count some of the ways demonstrated by the CNA's strike against the San Joaquin County Hospital:

- Pre-impasse-exhaustion strikes are illegal and harm delivery of public services. But unlike PERB's approach before 2016, the board won't ordinarily seek an injunction against an illegal pre-exhaustion strike because the unions will argue it is a legal unfair labor strike.
- Also in prior days, PERB required unions to give adequate notice of intended strike activity so employers could adequately prepare to mitigate the impacts of strike conditions. This is no longer the case.
- Facing a strike, employers spend hundreds of hours in intense operational planning. When they seek PERB's help, the board responds by

requiring employers to provide comprehensive declarations showing how a strike would disrupt operations. This work often entails hundreds of more hours of time, distracting employers from their main job of managing under strike conditions. In this case, the county spent a massive amount of time to prepare the evidence to make its case that certain nurses were necessary for health care to continue. Given PERB's standards, the county had to settle for a number of nurses that was much less than was required to protect patients.

- Adding to the challenge is the fact that public-sector supervisors have a right to join and fully participate in union activities. In the San Joaquin strike situation, the CNA and the SEIU both represented supervisors, who joined the strike, adding further to the difficulties. In evaluating strike injunction situations, PERB gives almost no weight to this fundamental problem.
- In all healthcare strikes (legal or not), employees who perform essential services who can't be replaced by managers or contractors can't strike. PERB requires employers to prove, in intricate detail, position by position, why an employee's work is essential and why it can't be performed by other workers. PERB gives no weight to the employer's judgment, experience, or expertise.

Bottom Line

Key pointers for management practitioners: Communication within the workplace, with elected boards, and with outside stakeholders is essential—and using expert PR professionals is usually advisable. Be prepared for surprises. Consider self-help—it's often best to manage a

strike (including exempting essential services workers) than to undergo the distractions and expense of relying on PERB.

Full disclosure: Sloan Sakai Yeung & Wong represented San Joaquin County in the cases discussed above.

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