The Right to Strike

Section 7 of the National Labor Relations Act states in part, "Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows:

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.

It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right. See for example, restrictions on strikes in health care institutions (set forth below).

Lawful and unlawful strikes. The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

It must be emphasized that the following is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

Strikes for a lawful object. Employees who strike for a lawful object fall into two classes "economic strikers" and "unfair labor practice strikers." Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

Economic strikers defined. If the object of a strike is to obtain from the employer some
economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements who are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

**Unfair labor practice strikers defined.** Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

** Strikes unlawful because of purpose.** A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union-security agreement in effect (Section 8(a)(3)). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike. Strikes of this nature will be discussed in connection with the various unfair labor practices in a later section of this guide.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of forcing the employer to do so. These points will be covered in more detail in the explanation of Section 8(b)(4). In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

** Strikes unlawful because of timing—Effect of no-strike contract.** A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of
conditions abnormally dangerous to health, such as a defective ventilation system in a
spray-painting shop, has been held not to violate a no-strike provision.

Same—Strikes at end of contract period. Section 8(d) provides that when either party
desires to terminate or change an existing contract, it must comply with certain conditions. If
these requirements are not met, a strike to terminate or change a contract is unlawful and
participating strikers lose their status as employees of the employer engaged in the labor
dispute. If the strike was caused by the unfair labor practice of the employer, however, the
strikers are classified as unfair labor practice strikers and their status is not affected by
failure to follow the required procedure.

Strikes unlawful because of misconduct of strikers. Strikers who engage in serious
misconduct in the course of a strike may be refused reinstatement to their former jobs. This
applies to both economic strikers and unfair labor practice strikers. Serious misconduct has
been held to include, among other things, violence and threats of violence. The U.S.
Supreme Court has ruled that a "sitdown" strike, when employees simply stay in the plant
and refuse to work, thus depriving the owner of property, is not protected by the law.
Examples of serious misconduct that could cause the employees involved to lose their right
to reinstatement are:

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

Section 8(g)—Striking or Picketing a Health Care Institution Without Notice. Section
8(g) prohibits a labor organization from engaging in a strike, picketing, or other concerted
refusal to work at any health care institution without first giving at least 10 days' notice in
writing to the institution and the Federal Mediation and Conciliation Service.

For more information please see the Basic Guide to the National Labor Relations Act [2].

Source URL: https://www.nlrb.gov/strikes

Links:
[1] https://www.nlrb.gov/national-labor-relations-act