

The Hits Keep On Coming: NLRB General Counsel's Office Seeks Potential Modifications To The Law Regarding Intermittent Strikes

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National Labor Relations Board (NLRB) case law has long held that while “full” strikes constitute protected activity under the National Labor Relations Act (NLRA), intermittent strikes (a pattern of going out, coming back, going out again) generally are unprotected. “Unprotected” does not mean that a labor union is prohibited from engaging in the activity (i.e., they do not constitute an 8(b) violation under the Act); rather, it means employees engage in the activity at their own peril because an employer is permitted to impose discipline on employees engaging in unprotected activity -- including termination -- without fear of violating Sections 7 or 8 of the NLRA. On October 3, 2016, however, the NLRB’s Office of the General Counsel issued a memo to all of the NLRB’s Regions stating that the General Counsel views at least some intermittent strikes to be protected by the NLRA, and the memo further indicates that the General Counsel’s office may be seeking to have the NLRB change the standard it utilizes to evaluate whether such strikes are protected. The General Counsel contends that the “Board’s present test for determining whether multiple short-term strikes are protected is difficult to apply ... and exposes employees to discipline for activities that should be protected under Section 7 of the Act.” Accordingly, the memo instructs the Regions to employ a different analysis set forth in a “model brief” when evaluating whether intermittent strikes are protected. The analysis set forth in the model brief would offer protection to intermittent strikes if: “(1) they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; (2) they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and (3) the employer is made aware of the employees’ purpose in striking.” To the extent a Region determines an intermittent strike warrants protection under this framework, the Region is instructed to submit the case to the NLRB’s Division of Advice to evaluate whether a complaint should issue. In other words, the General Counsel is looking for cases to bring to the NLRB to have it change long-standing law depriving intermittent strikes of NLRA protections. This is yet another example of the current NLRB’s aggressive push to diminish NLRA protections available to employers. We will update the blog as developments unfold on this front. Copies of the [memo](#) and the [model brief](#) can be found here.

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