HELP NEWS

The Monthly Newsletter of Helping Employees Learn Prosperity (HELP)

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Welcome!

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Helping Employees Learn Prosperity (HELP) is an IRC 501 (c)(4) charitable non-profit, tax-exempt, non-partisan, independent employee affiliation.

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HELP's status with the City of Los Angeles is a Qualified Employee Organization.

Legal Update on the Right to Strike for Public Employees

A California appellate court issued an important ruling for public employee organizations. (Oakland USD v. Public Employment Relations Bd. ("PERB") (2025) 1st App. Dist. A171007). The ruling confirms that public employees have the right to engage in strikes, including a strike to protest an alleged unfair labor practice (referred to as unfair practice strikes). The decision involves a state bargaining law known as the Educational Employment Relations Act ("EERA"), which covers certificated and classified school employees. (Gov't Code §3540-3549.3).

The court's holding is also relevant for employees covered by other state bargaining laws, such as the Meyers-Milias Brown Act ("MMBA"), which covers local government employees at a county, city, or special district. (Gov't Code §3500-3511). This month, we will explore the right to strike and discuss why the Oakland USD case is so important. Consult your professional staff before considering or planning any kind of work stoppage to evaluate the legality of any action the employee organization may take.

The Right to Strike.

What is a Strike. Often called labor's "ultimate weapon," a labor organization's right to strike is the right to withhold labor. A strike is different from picketing, which is designed to protest or raise awareness about a labor dispute.

Sometimes, strikes and picketing occur simultaneously, however not always. Public services are labor intensive; withholding labor, especially in certain key sectors of the workforce, can do serious damage to the employers' ability to deliver services. If an employer is refusing to bargain fairly, an effective strike can change that. In a strike, workers refuse to work until the employer takes some action – such as resolving a workplace dispute, agreeing to a bargaining demand, or returning to the bargaining table to negotiate in good faith.

Types of Strikes. Strikes under collective bargaining statutes like EERA and MMBA may include unfair practice strikes, economic strikes, and sympathy strikes. An unfair practice strike is in response to an alleged unfair labor practice committed by the employer. An economic strike is designed to exert pressure on the employer to agree to the union's bargaining proposals, most often on wages. A sympathy strike is to support a primary strike that is conducted by workers belonging to another union with the same employer.

Strikes Were Prohibited Under Common Law. Before 1985, public employees in California had no right to strike. In fact, their employers could, and did, fire employees for striking. At the time, all public employee strikes were prohibited under the common law. But forty years ago, sanitation workers in the County of Los Angeles called a brief strike to resolve a deadlock in bargaining. The matter went to court -- and a new legal precedent was established. (County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn. (1985) 38 Cal. 3d 564, 585-586, cert. denied, (1985) 474 U.S. 995).

The California Supreme Court ruled that strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that it creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike. (38 Cal. 3d at 586). In applying that standard, the Court said that there was no showing that the 11-day strike by sanitation workers imminently threatened the health and safety of the public. However, if the strike continued indefinitely, or if the availability of replacement personnel was insufficient to maintain a reasonable sanitation system, the district may have been able to show a substantial threat to the public health and welfare. (Id. at 587).

Strikes are Now Protected by Statute. Ten years ago, PERB held that "public employees enjoy a statutorily protected right to strike under the MMBA and other PERB-administered statutes." (Fresno County In-Home Supportive Services Public Authority (2015) PERB Dec. No. 2418-M at p. 34). The statutory right to strike covers economic strikes, unfair practice strikes, and sympathy strikes. An employer may not unilaterally prohibit strikes because the right to strike is statutorily protected. (City & County of San Francisco (2017) PERB Dec. No. 2536-M).

Not All Strikes are Legal. Today, public employees have the right to strike unless there is a valid "no strike" clause in their labor contract or MOU. Most MOUs have a no strike clause, and if so, a strike during the term of the MOU is still unlawful. Once the MOU expires, that prohibition against strikes expires with it. Expiration of the no-strike clause upon the expiration of the MOU is the exception not the rule. Typically, the terms and conditions of employment set forth in an expired MOU are maintained until a new agreement is reached or the impasse process is exhausted.

However, public employees can engage in an economic strike only when all other efforts at good faith negotiations have failed. This typically means the employee organization must first exhaust the bargaining process, including any applicable impasse procedures, before conducting a strike. An economic strike that occurs prior to exhausting the impasse process creates a rebuttable presumption that the employee organization is refusing to negotiate in good faith or refusing to participate in impasse procedures. (Regents of University of California (2010) PERB Dec. No. 2094-H, at p. 31). This presumption resumes if an impasse is broken, and lasts until the

parties reach another impasse. (United Public Employees of California, PERB Dec. No. 2480 at pp 3-8).

The employee organization's membership must also authorize a strike for it to be legal. It cannot be called by the bargaining committee, organization leaders, or an individual member. Regardless, a strike may be unlawful if the employer can clearly show a substantial and imminent threat to public health and safety. (City of San Jose v. Operating Engineers Local Union No. 3 (2010) 49 Cal.4th 597, 606) (citing County Sanitation).

Who can Strike. There is considerable uncertainty about who may be prohibited from striking. Some public employees are still clearly prohibited, such as those who perform direct public safety duties (e.g., police officers or firefighters). Courts will look to:

(1) Whether a statute prohibits any relevant classification from striking,

(2) The duration of the threatened strike,

(3) The nature of the duties performed by the striking employees, including how those services compare to services commonly provided in the private sector, and

(4) The availability of replacement personnel.

Not all public employees can strike

PERB applies a test that considers the nature of the services performed by any "essential" employees and whether the employer can clearly demonstrate that disruption of those services for the length of the strike would imminently and substantially threaten the public health or safety. (San Mateo County Superior Court (2019) PERB Order No. IR-60-C, at p. 4). In some cases, the public may be sufficiently protected if employees are on call – i.e., ready to cross the picket line if needed in the event of an emergency. In other cases, employees may need to work their entire shift to protect the public. The most common local government employees who are deemed "essential" are those responsible for operating and monitoring water, wastewater treatment, and electrical facilities, and those working in twenty-four-seven work settings, such as a police department. In some cases, employees may be permitted to strike if the action is of limited duration, a skeletal crew remains on duty, or employees are available on call for emergencies. Employees may also be identified under a "line pass arrangement" where the employee organization agrees to exempt essential workers from a threatened strike. The legality may also depend on

whether supervisors, managers, and other non-striking employees are available to cover the essential services for the planned duration of the strike.

Preparation and Notice. Successful strikes must be carefully planned. Both sides can spend months preparing for possible strikes that both sides hope will not occur. Preparations, even those occurring before an impasse is reached, are generally lawful if they are to prepare for a lawful strike. (Sweetwater Union High School District (2014) PERB Dec. No. IR-58, at pp. 9-19). There is no rule requiring local government employees to provide a specific amount of advance notice of a strike. Federal law covering private sector workers, and employees in some healthcare settings, may have more specific notice requirements. Regardless, failure to provide any notice may result in a strike being deemed unlawful. For example, PERB requires "adequate notice" before a strike. (San Ramon Valley Unified School District (1984) PERB Order No. IR-46, at pp 14-16). This is to protect the public from the consequences of a surprise strike.

School closures sparked a lawful strike

Why the Legality of the Strike is So Important. The stakes are high in conducting a strike. In addition to the considerable logistics for conducting an effective strike, there is a chance that the strike does not have its intended effect on management or the public. There is also a risk that a strike will be deemed unlawful. The subsequent determination about the legality of the strike matters because an employer can fire workers who engage in an unlawful strike and refuse to reinstate them. Most workers struggle to support themselves financially during a strike and cannot afford to lose their job altogether.

The type of strike also matters. If the strike is lawful, an employer must reinstate workers who engage in an unfair practice strike at the end of the strike. This means an employer will often have to use temporary replacement workers during an unfair practice strike. Economic strikes are different. In these situations, an employer can permanently replace striking workers; they do not have to use temporary replacements. However, an employer must reinstate workers who make an unconditional request for reinstatement during or at the end of any lawful economic strike, assuming a vacant position is available. This is an important consideration. Itis one reason why workers often call an unfair practice strike, and not an economic strike, even when bargaining for economic gains.

The Oakland USD Case.

The Underlying Dispute. The Oakland USD case involved a strike by the Oakland Education Association ("Association"), a public employee organization that is the exclusive representative for certain employees of the Oakland Unified School District ("District"), which is a public employer. The District and the Association negotiated over language regarding school closures in their previous labor negotiations but did not reach an agreement as part of their new MOU. During the term of the new MOU, the District Board voted to close schools. However, the District did not notify the Association or allow for negotiations over the impact of the closures prior to implementing them.

Association members conducted a work stoppage that lasted one day. The Association also filed an unfair practice charge with the PERB, claiming that the District committed unfair practices by implementing the school closures without notifying or bargaining with the Association. In response, the District filed its own charge, alleging that the Association's one-day strike was unlawful. PERB ruled that the District committed an unfair practice by unilaterally closing schools. PERB also held that the Association's unfair practice strike was legal. The District appealed by filing a petition with the California court of appeal to challenge the ruling about the legality of the strike.

What the District Argued. The District advanced three main arguments on appeal:

1. All strikes are unlawful under EERA.
2. This strike was unlawful because the Association had not exhausted the bargaining process including the impasse procedures.
3. An unfair practice strike is generally unlawful until PERB determines that the alleged unfair practice has

News Release - CPI Data

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

2.9% - CPI for All Urban Consumers (CPI-U) Nationally

3.2% - CPI-U for the West Region

3.3% - CPI-U for the Los Angeles Area

2.5% - CPI-U for San Francisco Bay Area

3.5% - CPI-U for the Riverside Area (from July)

4.0% - CPI-U for San Diego Area (from July)

in fact occurred.

The court rejected each of these arguments.

1. Unfair Practice Strikes are Lawful Under EERA. The court began by saying that "[e]ver since the Legislature began giving public employees the right to collectively bargain through laws like the [EERA], the issue of whether strikes are legal under those laws has been lurking in the background. Despite this, no California court has squarely addressed this issue. We fix this curious omission and hold that public school employees may engage in unfair labor practice strikes under the EERA." The court's lengthy opinion looked at the history of public sector collective bargaining statutes in California and prior legal cases on strikes. The District argued this precedent was limited to the MMBA and did not apply to EERA. The court disagreed. The court said there are no differences between the EERA and the MMBA that make those cases inapplicable under EERA.

"Public school employees, like every other public employee, have a qualified right to strike – including a qualified right to engage in unfair practice strikes – under the common law. They may therefore engage in any unfair practice strike that does not imminently threaten public health or safety so long as no statute or constitutional provision prohibits them from doing so." The court emphasized that the Legislature included language expressly prohibiting strikes in collective bargaining statues governing firefighters (Labor Code §1962) but did not do so in EERA.

In short, the court was not willing to say that all strikes were unlawful under EERA, a position the District had argued. Instead, the court said it must defer to PERB's interpretation of state bargaining laws unless that interpretation is clearly erroneous. (Boling v. Public Employment Relations Bd. (2018) 5 Cal.5th 898, 911-912). Here, PERB's ruling about the legality of unfair practice strikes under EERA was not clearly erroneous.

2. No Exhaustion Requirement for Unfair Practice Strikes. The District argued that, by establishing rigorous impasse procedures, the EERA prohibits pre-impasse unfair practice strikes. The court rejected that argument, too.

The court looked at a prior PERB case that held a pre-impasse economic strike intended to gain concessions at

the bargaining table violated the EERA. (Westminster School Dist. (1982) PERB Dec. No. 277, pp. 14-16). The Board said a union "must be strictly held to its duty under EERA to press its demands at the bargaining table and through the statutory impasse procedures," at least "[i]n the absence of employer provocation which itself upsets the bargaining process." (Id. at p. 17). PERB distinguished economic strikes from unfair practice strikes, which are provoked by the employer's own conduct. (Id. at 14-17).

The court also said that EERA's extensive impasse procedures do not prohibit unfair practice strikes before the parties complete its impasse procedures. PERB does not prohibit all pre-impasse strikes provoked by an employer's unfair practices because doing so would reward unclean hands and because unfair practices make good faith bargaining impossible. The court agreed and said that once the employer has violated its duty to bargain in good faith, any impasse procedure – which is rooted in the duty to bargain and depends on the employer's good faith – becomes pointless and ineffective.

3. Unfair Practice Strikes Can Occur Right Away.

Finally, the District argued that even if pre-impasse unfair practice strikes are allowed under EERA, they should be prohibited until PERB has determined that the employer has, in fact, committed an unfair practice.

The court rejected that argument, too. The court found that PERB did not clearly err in upholding the legality of unfair practice strikes conducted before the underlying charge was litigated, in part because PERB has broad discretion over the handling of unfair practice cases. Decisions by the National Labor Relations Board interpreting federal labor law support this conclusion.

Importantly, the court said that forcing public school employees to wait years before PERB issues a final decision would send a clear message to these workers that PERB cannot provide meaningful relief. "Where, as here, the employer violated its statutory duty to bargain in good faith – thereby, relieving its employees of any duty to bargain – that lengthy delay before a final disposition could make both employers and employees less likely to comply with their obligations under EERA. This would, in turn, frustrate the purpose behind EERA."

The court also said PERB has the power to intervene immediately. PERB can petition the court for appropriate temporary relief or a restraining order to stop any strike until a determination has been made on the underlying unfair practice charge. To establish injunctive relief, PERB only needs to establish reasonable cause to believe an unfair practice has occurred and demonstrate that the relief sought is just and proper. The court said that PERB could petition the court to enjoin an unfair practice strike in those instances where PERB thinks the underlying unfair practice charge lacks merit. The court said this is a sensible reading of the law, and a proper balance between labor's right to strike and the public agency's mission to provide vital public services.

Conclusion.

As the court said in Oakland USD, work stoppages should be prevented at all costs. A work stoppage should also not be executed hastily. A strike is a weapon of last resort. It should be carefully planned with professional staff to ensure it is lawful and aligned with the organization's objectives. If a pre-impasse strike is necessary, conducting an unfair practice strike, rather than an economic strike, can provide more protection.

A strike is a last resort

A membership vote to strike should be unanimous or nearly unanimous, and a strike should not be called until a no-strike clause in the MOU expires and is no longer in effect. The employee organization should carefully consider the duration of the strike, and which employees can legally participate. The employee organization should also work with professional staff to evaluate whether a proposed work stoppage might result in a substantial and imminent threat to public health and safety, which would make the strike unlawful. Finally, the employee organization should provide adequate notice to the employer. Not only is this required, but in most instances, the threat of a carefully planned strike will prove more effective than an actual strike.

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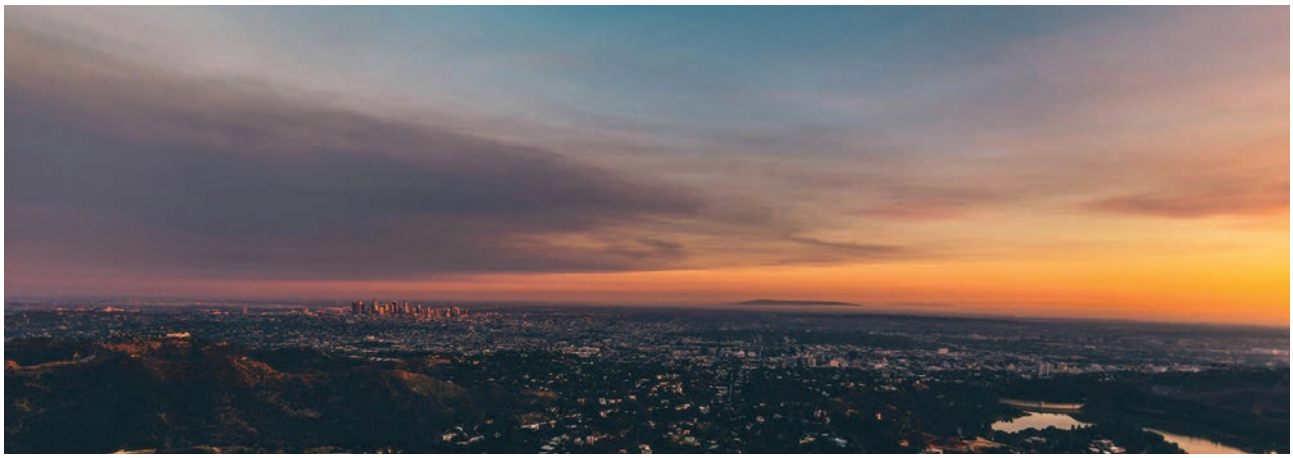
Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job.
The following are some GENERAL answers.
If you have a specific problem, talk to your professional staff.

Question: What qualifies for shift differential? Currently, only a few of our staff receive shift differential pay. We asked HR because we have other staff who routinely work after hours but are not eligible for or receive this benefit. HR says the difference is that they are not routinely and consistently scheduled to work other than a standard "daytime" shift. Is that correct? How can we get more positions added to shift differential pay?

Answer: Shift differential pay is a negotiated benefit, so it largely depends on the MOU language. Shift differential pay is often tied to an employee's regularly assigned shift. Under state retirement law, shift differential pay is a special assignment pay that counts towards pensionable income if it is "compensation to employees who are routinely and consistently scheduled to work other than a standard 'daytime' shift, e.g., graveyard shift, swing shift, shift change, rotating shift, split shift or weekends." (2 CCR §571.1(b)(3) & 2 CCR §571(a)(4). Your MOU can provide for additional pay in other situations, but it would not be pensionable under this section. It may be that your HR quoted from the law, or that the MOU language mirrors the language in the statute.



However, your MOU language may apply more broadly. Check your specific MOU language and inquire further about how management applied this in the past. Your employee organization can propose language in the next MOU negotiation to either broaden the existing benefit or add different categories of specialty pay that may apply in other situations to more workers. For example, some MOUs provide for premium pay for all hours worked at night or on weekends.

Question: **If an employee is planning to resign, can they use benefit time to cover their last days of work? For example, if the employee's last work week is 11/17-11/20 can they tell their employer they will work 11/17, 11/18 and use vacation benefit time for 11/19 and 11/20? Or is that not allowed? There is nothing written in our MOU. I do not want to ask HR.**

Answer: There is no law that prohibits using leave in your final days of employment, but employers can require that vacation time be approved in accordance with current policy.

Most policies give management discretion about whether to approve or deny vacation requests. Some employers allow employees to burn down vacation before separation. Other employers prefer the employee to work all the way through the last date and cash out any accrued vacation at the time of separation. All accrued vacation must be cashed out upon separation, so the employer may be willing to allow those days to be coded as vacation. Whether management approves your request may depend on how much they want you to work on your last two days. Management should not be denying your request just because you are resigning, if you are otherwise eligible under the policy, but you also do not have any enhanced right to use vacation because you are separating.

If you do not want to work on 11/19 and 11/20, but you still want to be paid for those days, one approach is to request and be approved for those days in advance before you submit your resignation notice. Another approach is to identify in your resignation notice that your last day of work is 11/18, your last day of employment is 11/20, and you will use vacation to cover 11/19 and 11/20. In other words, make them come back and tell you no. If they do, you might respond that your last day of work and of employment is 11/18. In that case, know that you will still receive pay for 11/19 and 11/20. It will come in the form of vacation cash-out and not your regular payroll check. For employees separating from a local government agency, the leave cash-out and final paycheck are often paid on the same pay date, which is the pay date for the payroll period that includes the separation date.

Question: I requested to work remotely as an accommodation so I can be home with a child who is disabled. Do they have to provide this accommodation under the ADA?

Answer: The ADA is a federal law that protects employees from discrimination based on disability and requires employers to provide reasonable accommodation so that an employee with a disability can perform the essential functions of the job. The ADA does not require employers to reasonably accommodate an employee based on their child's or other family member's disability.

However, since the ADA prohibits discrimination against an employee based on the employee being associated with someone (such as a child or other family member) who is disabled, an employer must extend the same leave benefits and modifications to the parent of the disabled child as it extends to all other employees. In other words, if management allows other employees in the same type of job to work remotely, then the ADA requires the employer to offer you the same consideration. However, the ADA does not require management to give you any rights based on your child's disability above and beyond what it provides to other similarly situated employees.

The FMLA may be more helpful in your situation. This federal law provides up to twelve weeks of unpaid leave to care for a child with a serious health condition. The leave may be taken intermittently. While the FMLA does not require the employer to allow you to work remotely, requesting FMLA leave may result in management being more willing to consider remote work as a viable option. Know that the employer cannot require remote work in lieu of providing leave if what you want is a leave of absence.

A state and federal court have issued legal decisions under the Fair Employment and Housing Act (FEHA) suggesting that employers may have to reasonably accommodate employees who associate with someone with a disability. FEHA is a state law that provides similar protection as the ADA. However, there needs to be more caselaw before these decisions can safely be relied upon to require employers to accommodate an employee based upon association with a disabled person.

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