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General Counsel's New Standard on Intermittent Strikes, Another Untenable Position for Employers

On October 3, 2016, the National Labor Relations Board's (Board) Office of the General Counsel (General Counsel) issued a memorandum seeking to broaden a union's right to engage in intermittent strikes, which it defines as multiple short-term strikes—"a plan to strike, return to work and strike again." The memorandum addresses the issue because unions have been turning to this tactic more frequently in recent years. By their nature, intermittent strikes can be especially burdensome on employers because of the frequent disruptions to their business operations.

Although the General Counsel notes that intermittent strikes can disrupt operations, it argues that they should not be deemed unlawful because they are particularly effective in achieving that goal. The General Counsel adds that the current standard for determining whether intermittent strikes are protected activity is unclear and that the standard unnecessarily deprives unions and employees of the right to strike. It contends, among other things, that the current standard unnecessarily prioritizes the impact on an employer's operation over a union's right to engage in intermittent strikes. The new standard would permit intermittent strikes as long as "(1) they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdown; (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' purposes in striking." While the General Counsel posited that a 10-minute strike every 30 minutes would be unprotected, its example begs the question of whether strikes every other day would be protected.

In defense of its position, the General Counsel notes that employers are not helpless to combat intermittent strikes but can turn to numerous strategies, including permanently replacing employees who go on strike. Although many problems exist with the proposed new standard, the General Counsel seems to have overlooked the Board's May 2016 decision in *American Baptist Homes of the West*. In that case, the Board held that it is unlawful for an employer to permanently replace striking employees if the employer's motive is "to avoid future strikes." In this regard, the General Counsel's suggestion that an employer can "cope" with intermittent strikes, which by definition include future strikes, by permanently replacing those employees appears either disingenuous or misguided. Rather than achieve clarity, the General Counsel's proposed standard would create another layer of confusion as employers struggle to determine how to contend with intermittent strikes.

At this point, the Board has not acted on the General Counsel's proposed standard, but the General Counsel is asking the Board's regional directors to identify cases involving intermittent strikes and to apply this new standard when prosecuting those cases before administrative law judges and the Board. We will continue to follow this issue as it develops.

For more information, or if you have questions about how the issues raised in this legal update affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's Labor Relations Group:

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