LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

2024 Public Sector Conference

The Right to Strike: Basic Civil Liberty or Threat to Larger Community Interests?

Friday, May 10, 2024
4:00 p.m. – 5:15 p.m.

Speakers:

Daniel Rojas

Dan Trump

Madeline Miller

Conference Reference Materials

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2024 Public Sector Conference

May 10, 2024
Sheraton Grand Sacramento Hotel
Sacramento, CA

The Right to Strike: Basic Civil Liberty or Threat to Larger Community Interests?

Speakers:
Daniel B. Rojas, Rothner, Segall & Greenstone
Daniel M. Trump, Public Employment Relations Board
Madeline E. Miller, Sloan Sakai Yeung & Wong LLP

THE RIGHT TO STRIKE

“We believe in the right of unions and the workforce to express their opinion and take full advantage of the ability to strike. That is sacrosanct. That is an inherent right of our workforce. . . .

- Alberto M. Carvalho,
Superintendent of LAUSD

“We also believe in understanding where our students are and considering the consequences of what we do in terms of the immediate and long-term impact on them.”

THE RIGHT TO STRIKE

Justice Phil S. Gibson

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal. 2d 684:

> In the absence of legislative authorization public employees in general **do not have the right to strike** . . . and the questions presented here are whether the act creating the transit authority gave its employees such a right and, if so, whether the statute is constitutional as applied to the employees represented by the brotherhood.

THE RIGHT TO STRIKE

Justice Phil S. Gibson

- The Los Angeles Metropolitan Transit Authority Act afforded certain public employees the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purpose of collective bargaining
- The Act granted employees the right to strike, and that the Act, so construed, is not unconstitutional.

THE RIGHT TO STRIKE

- Until the 1960s, public employee strikes were largely illegal in every jurisdiction in the United States.
- Yet, hundreds of thousands of public workers struck anyway, violating state laws and court injunctions.
- Even though strikes remained illegal in the union strongholds of New York, Ohio, and Illinois, strike levels were high there throughout the 1970s.

Memphis Sanitation Workers' Strike

February 12, 1968 – April 16, 1968

Memphis Sanitation Workers' Strike

"I've seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the Promised Land! And so I'm happy, tonight. I'm not worried about anything. I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord!"

- Dr. Martin Luther King Jr.
Memphis, Tennessee, April 3, 1968

RIGHT TO STRIKE

Coincidentally, the Meyers-Milias Brown Act (MMBA), the first comprehensive state law granting municipal and county employees *full* collective bargaining rights, was signed into law on August 21, 1968.

County Sanitation District No. 2 v. Los Angeles County Employees Association

In 1985, the California Supreme Court concluded that its previous holding in *LA Metropolitan Transit Authority* constituted dicta and held in *County Sanitation District No. 2 v. Los Angeles County Employees Association* (1985) 38 Cal. 3d 564, that, in the absence of legislation explicitly stating otherwise, most public sector employees enjoy a *qualified* right to strike.

County Sanitation District No. 2 v. Los Angeles County Employees Association

"A final policy consideration in our analysis addresses a more philosophical issue: **the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty**. The widespread acceptance of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community. Plaintiff's argument that only the Legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it."

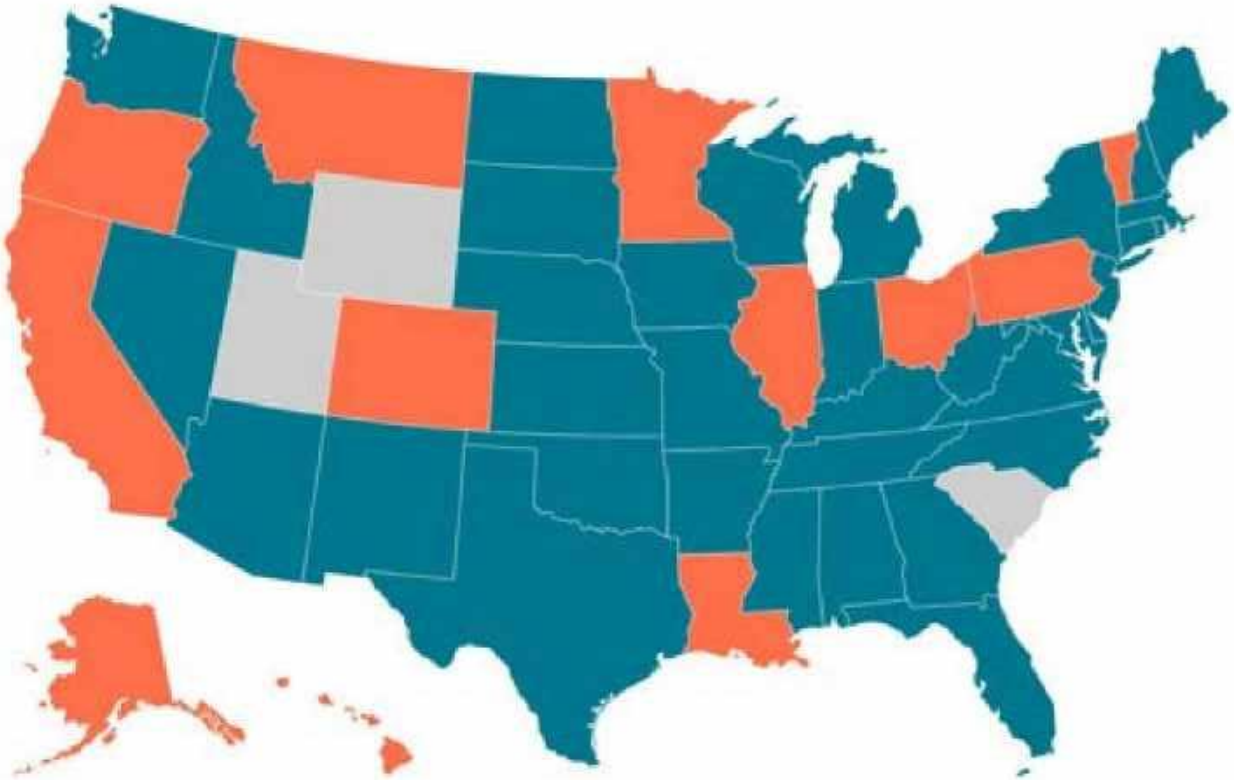
Justice Allen Brousard

County Sanitation District No. 2 v. Los Angeles County Employees Association

“[S]trikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike 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 also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.”

Justice Allen Brousard

Teacher strikes are illegal in most states, but allowed in some. A few states have no statute.



Map: Ed100 Lesson 7.5 • Source: Center for Economic and Policy Research • Get the data • Embed • Created with Datawrapper

UNPROTECTED STRIKES

- Firefighters (Lab. Code § 1962)
- Peace Officers (*City of Santa Ana v. Santa Ana Police Benevolent Assoc.* (1989) 207 Cal. App. 3d 1568)
- “Essential” Workers (*County Sanitation District No. 2 v. Los Angeles County Employees Association* (1985) 38 Cal. 3d 564)

OTHER UNPROTECTED STRIKES

- Pre-Impasse Strikes. See *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Dec. No. 2418-M)

- Intermittent Strikes. *Regents of the University of California* (2019) PERB Order No. IR-62-H.

- "Surprise" Strikes. *San Ramon Valley Unified School District* (1984) PERB Order No. IR-46.

PRE-IMPASSE STRIKES

A union must reach good-faith impasse in negotiations and exhaust advisory fact-finding procedures to undertake a strike unless…

- The purpose of the strike is to protest the employer's **unfair labor practices**.

There is a rebuttable presumption that a strike undertaken before impasse is declared is unlawful. *Regents of the University of California* (2010) PERB Decision No. 2094-H.

UNFAIR PRACTICE STRIKES

Unions generally take the position that the presumption that a pre-impasse strike is unlawful can be overcome by establishing that:

(1) the employer committed an unfair practice, and
(2) the employer's unfair practice was a substantial motivating factor leading to the strike. An unfair practice need not be the sole motivating factor causing employees to strike, provided that it is one substantial cause of employees going on strike.

Sweetwater Union High School District (2014) PERB Dec. No. IR-58; *see, e.g.*, *Golden Stevedoring Co*. (2001) 335 NLRB 410.

INTERMITTENT STRIKES

Intermittent Strikes have been held to amount to an unlawful pressure tactic:

"In contrast to a strike of short duration, the present case involves an intermittent strike, where the employees are allegedly retaining the benefits of working and striking at the same time."

"In essence, the intermittent strike allows the employees to pick and choose when they work, and be able to afford to strike because of the economic benefit earned when not striking."

Fremont Unified School District (1990) PERB Order No. IR-54)

INTERMITTENT STRIKES

Fremont Unified School District (1990) PERB Order No. IR-54)

- March 2: 1-day strike
- April 4: 1-day strike
- April 19: 1-day strike
- May 3: 48 hours notice of 2-day strike, no strike occurred

NOT AN INTERMITTENT STRIKE

(1) called by different bargaining units, with others going out in sympathy;
(2) in part precipitated or provoked by a public employer's alleged unfair conduct;
(3) preceded by a notice period of sufficient length to permit the employer to prepare for continued operations during the strike; and
(4) separated by variable intervals of time sufficient to dispel the notion that the Unions planned their activities in advance or embarked on a coordinated strategy of rolling economic strikes.

Regents of the University of California (2019) PERB Order No. IR-62-H.

STRIKE NOTICE

In considering the motive underlying a strike, i.e., whether the strike is an unlawful economic pressure tactic, PERB usually considers the amount of notice afforded to the employer.

- Healthcare Strikes: Due to NLRA Section 8(g), general practice in California is 10 days' notice

- All other strikes:
  - "At this juncture, we are unable to determine what, as a matter of law, would constitute "sufficient" notice. However, after weighing declarations submitted by the District and the Association's response, we feel that 60 hours would, on the facts of this case alone, provide sufficient notice to the District."

San Ramon Valley Unified School District (1984) PERB Order No. IR-46

SYMPATHY STRIKES

"Sympathy strikes [are] protected, unless they [violate] a no-strike clause that **unequivocally waived the right to engage in a sympathy strike**. We take this occasion to clearly state that the right to participate in the activities of an employee organization for the purpose of representation on all matters of employer-employee relations includes the right to honor the picket line or engage in other acts of solidarity with other employees who are engaged either in a primary strike or an unfair practice strike against their employer."

City and County of San Francisco (2017) PERB Decision No. 2536-M

SYMPATHY STRIKES

"Although *County Sanitation* . . . and *City of San Jose . . .* involved primary strikes, the right established in those cases to 'participate in activities of an employee organization' by means of a strike is broad enough to encompass sympathy strikes undertaken in support of either protected unfair practices strikes or protected economic strikes by other bargaining units. This is consistent with the view of sympathy strikes in the private sector under the NLRA."

City and County of San Francisco (2017) PERB Decision No. 2536-M

CLEAR AND UNMISTAKABLE WAIVER?

[I]t is mutually agreed and understood that during the period this Agreement is in force and effect the Union will not authorize or engage in any strike, slowdown, or work stoppage. Represented employees are also bound by the above. . . .

REMEDY

- PERB has exclusive initial jurisdiction to seek injunctive relief on behalf of a public employer. *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597.

- PERB lacks the ability to order monetary damages for illegal strikes. See Gov. Code § 3563.3.

- Cease and desist order and other non-economic, make-whole remedies still available along with ability to discipline employees who participated in unprotected strike.

REQUESTS FOR INJUNCTIVE RELIEF

TWO PATHS

A union issues a strike notice. What happens now?

1. Request for Injunctive Relief: Employer provides 24-hour notice of intent to seek injunctive relief, (PERB Reg. 32450.) Employer files a Request for Injunctive Relief, Supporting Declarations, a and Unfair Practice Charge

2. Informal Conference: The parties participate in an informal conference to settle and/or negotiate a Line Pass Agreement

Good afternoon,

Pursuant to PERB Regulation 32450, please be advised that the County of San Joaquin intends to file a request for injunctive relief against the California Nurses Association/National Nurses United (CNA/NNU) 24 hours after this notice. The request for injunctive relief will seek to enjoin an anticipated strike on February 27, 2021, at 7:00 am through March 2, 202, at 6:59 am by CNA/NNU bargaining unit members on the grounds that the strike will pose an imminent threat to public health and safety.

We will also file this notice through the ePERB Portal. Thanks.

_____

Madeline E. Miller | Senior Counsel
Sloan Sakai Yeung & Wong, LLP
d: 916-258-8815 | mmiller@sloansakai.com

EMPLOYER'S INITIAL FILING

- The employer submits:
  - Request for Injunctive Relief
  - Evidence to PERB via ***declarations*** from individuals with personal knowledge and/or the appropriate background.
  - Unfair Practice Charge
- The union is provided an opportunity to oppose the requests for injunctive relief through its own evidence.

STANDARD FOR INUNCTIVE RELIEF

A Superior Court must grant PERB's request for injunctive relief when two elements are shown:

(1) the Board has "reasonable cause" to believe an unfair practice has been committed; and

(2) the injunctive relief requested is "just and proper."

(a) there is a probability that the purposes of the acts administered by PERB will be frustrated unless temporary relief is granted;
(b) the circumstances of the case create a reasonable apprehension that the efficacy of the Board's final order may be nullified; or
(c) the administrative procedures will be rendered meaningless if injunctive relief is not granted.

Public Employment Relations Board v. Modesto City School District (1982) 136 Cal.App.3d 881, 886

EXAMPLE: ESSENTIAL WORKERS

Failure to Exempt Essential Workers

Public employees whose ***absence from work creates a substantial and imminent threat to the health or safety of the public***. (*County Sanitation, supra,* 38 Cal.3d 564, 586)

Minus: Replacement workers (e.g., unrepresented managers or supervisors, non-bargaining unit employees, temporary/ contract workers, travelers, registry, or employees at other public agencies).

Equals: Essential employees prohibited from striking.

COUNTY OF SAN MATEO

Determining "whether a particular employee's job is so essential that the employee may not legally strike is a complex and fact-intensive matter." (*City of San Jose*, *supra*, 49 Cal.4th at p. 601.) We consider the nature of the services the alleged essential employees perform and whether the employer has clearly demonstrated that disruption of such services for the length of the strike would imminently and substantially threaten public health or safety. (*San Mateo Superior Court*, *supra*, PERB Order No. IR-60-C, p. 4.)

County of San Mateo (2019) PERB Order IR-61-M

Typical Departments with Essential Workers:

<u>Healthcare:</u>
Intensive Care Unit
    Neonatal Intensive Care Unit
    Burn Intensive Care Unit
Trauma
Custody Health
Acute Psychiatric Services

<u>County and City Services:</u>
Public Works (Water, Sewer)
Dispatch
Social Services – Benefits
Animal Control?
Elections?

Who is not an Essential Worker?

- Absence would not result in potential loss of life or injury (substantial and imminent threat to public health and safety)

- Services can be delayed until after the strike
  - Does not work weekends or holidays

- Can be replaced by outside contractor
  - Non-specialized services
  - No mandatory certifications or minimum training/experience
  - No background check required

DUTY TO SEEK REPLACEMENTS

County of San Mateo (2019) PERB Order IR-61-M

p. 25.) Pursuant to the *County Sanitation* standard, an employer is not entitled to an injunction merely because it would cost the employer a substantial amount of money to hire replacements.

...

The County had more than enough time to seek replacements in this case. Its decision not to utilize national striker replacement companies, and its failure to provide the aforementioned documents regarding its reliance on local companies, were each a sufficient basis for PERB to deny entirely the County's injunction request at SMMC. Nonetheless,

PERB TIMELINES

- PERB's General Counsel issues a confidential recommendation to the Board (within 24 hours from request if strike has started, or within 120 hours if not)

- Board decides which positions are essential and issues a draft Exhibit A listing each essential position and how many workers are required in a 24-hour period (no deadline, but enough time to allow PERB to file in court)

- Union is offered the chance to agree to the numbers in PERB's order on a short deadline:
  - If they agree, the matter is moot and Request is denied
  - If they do not agree, PERB goes to Court to seek injunctive relief

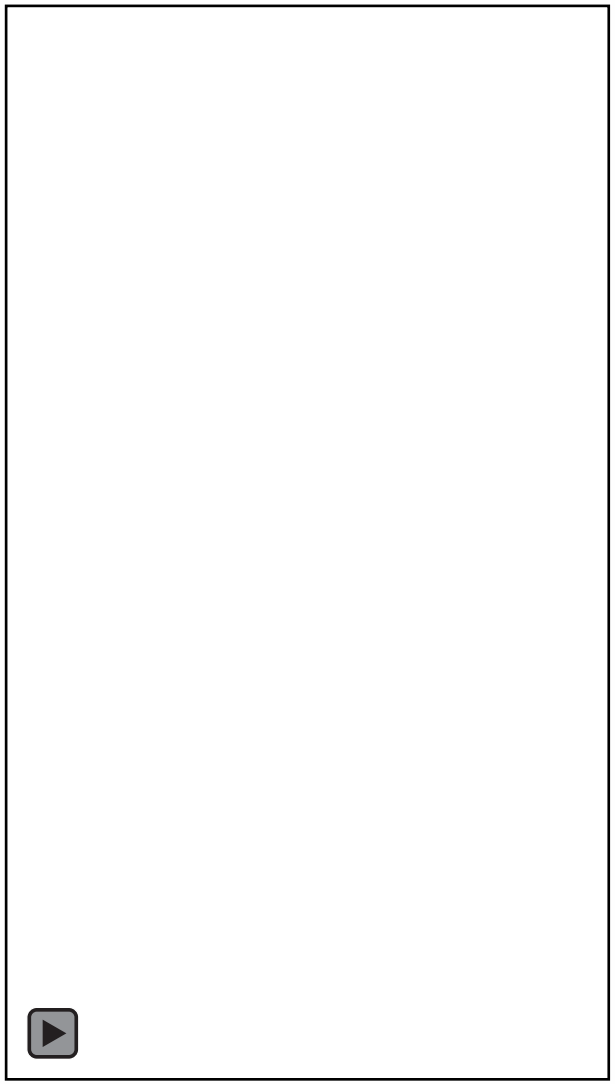
SAMPLE PERB ORDER

Classification/ Position	Location	Job Duties	Imminent Threat/Essential Function	Number Requested	Approved by PERB
Public Safety Radio Dispatcher	911 Call Center	Public Safety Radio Dispatchers perform journey-level call-taking and dispatching duties for fire and medical emergencies. Weekend and holiday: 14	Public Safety Radio Dispatchers are responsible for dispatching fire personnel and equipment for routing and emergency calls utilizing computer-aided dispatch systems (CAD), video display terminals, and radio dispatching consoles. They answer the telephone and receive emergency, non-emergency, and 9-1-1 requests for assistance; evaluate the information and create a CAD system event by typing live conversation text and command strings into a CAD system, transfer the call to the proper emergency service provider, or provide information or instructions to the caller. Available: One Division Manager, One Police Communication Specialist, and three (3) Firefighters.	14	9

LINE PASS NEGOTIATIONS

PERB immediately invites the parties to participate in negotiations to agree on which employees will be given “line-passes” (i.e., which workers the union would agree would not participate in the strike).

LINE PASSES IN ACTION



County of San Joaquin
CNA and SEIU Strike (March 2020)

WITHDRAWAL OF UPC AND REQUEST FOR IR

PERB Received
02/22/21 14 04 PM

Sloan Sakai
ATTORNEYS AT LAW

PERB Filed
02/22/21

Madeline E. Miller
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February 22, 2021

Kimberly J. Procida
Regional Attorney
Public Employment Relations Board
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124

Re: County of San Joaquin v. California Nurses Association;
PERB Case No. SA-CO-151-M; IR No. 797

Dear Ms. Procida:

The County of San Joaquin withdraws with prejudice the above-referenced Unfair Practice Charge and Request for Injunctive Relief. Thank you.

Sincerely,

Madeline E. Miller

cc: Nicole Daro
California Nurses Association

RECENT DEVELOPMENTS

Recent Developments

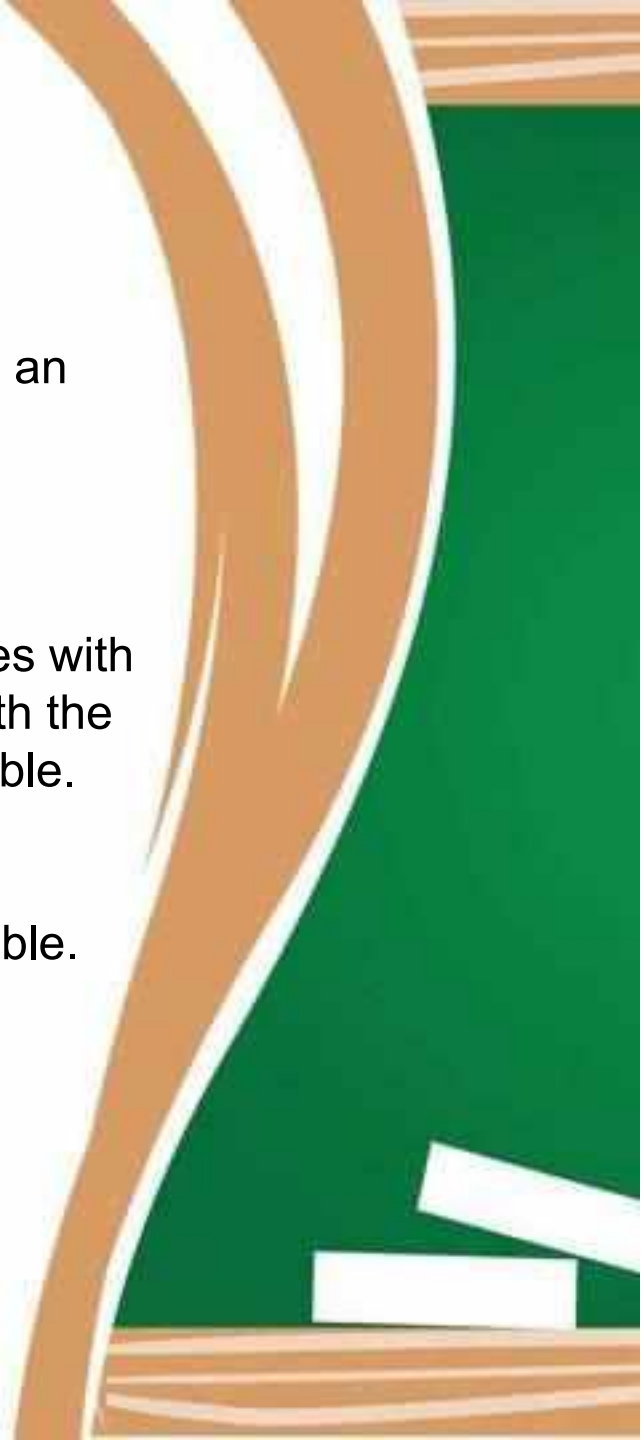
- *City and County of San Francisco* (2023) PERB Decision No. 2867-M
- Assembly Bill No. 2404 (Lee) (Assembly Bill No. 504 redux)
- Assembly Bill No. 2889 (Zbur)

City and County of San Francisco (2023) PERB Decision No. 2867-M

Since 1976, the San Francisco Charter has maintained an absolute ban on strikes by its employees.

Two unions, International Federation of Professional & Technical Engineers, Local 21, AFL-CIO and Service Employees International Union, Local 1021 filed charges with PERB alleging that these Charter provisions conflict with the Meyers-Milias-Brown Act and are therefore unenforceable.

The Board agreed with the unions and held that the challenged Charter provisions are void and unenforceable.



"The MMBA provides that '[e]xcept as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.' (Gov. Code, § 3502.) ... [T]his language confers a 'qualified right to strike recognized by the Supreme Court...' ... 'As such, strikes by public employees are statutorily protected, except as limited by other provisions of the MMBA or other public-sector labor relations statutes and controlling precedent.' (*Ibid*.)" (*City and County of San Francisco* (2023) PERB Decision No. 2867-M, p. 25.)

What about arbitration?

Apparently unique among public agencies in California, San Francisco has mandatory interest arbitration for non-safety employee bargaining units in the event of an impasse in negotiations.

The City and County contended that the strike prohibition “is part of a quid pro quo for binding interest arbitration” under the Charter.

"[W]e find that [the] Charter … validly forces a union to make this choice: if it calls an economic strike to pressure the City to make contract concessions, then the City at that point has sole discretion to decide whether it still wishes to engage in interest arbitration during that contract negotiation cycle. That is the quid pro quo that the Charter lawfully imposes... But that tradeoff does not support the far broader flat ban on all strike activity…" (*City and County of San Francisco* (2023) PERB Decision No. 2867-M, pp. 33-34.)

Stay Tuned!

City and County of San Francisco et al. v. Public Employment Relations Board (A168540)

Assembly Bill No. 2404 (Lee)

SECTION 1.

Section 3550.1 is added to the Government Code, to read:

3550.1.

(a) The Legislature finds and declares that the right of a public employee to demonstrate solidarity with other public employees by honoring a strike or by refusing to enter upon the premises or perform work for a public employer engaged in a primary strike is a fundamental human right protected by the California Constitution and laws of this state.

Assembly Bill No. 2404 (Lee)

3550.1.

(b) Notwithstanding any other law, and except as provided in subdivision (g), it shall not be unlawful or a cause for discipline or other adverse action against a public employee for that public employee to refuse to do any of the following:

(1) Enter property that is the site of a primary strike.

(2) Perform work for a public employer involved in a primary strike.

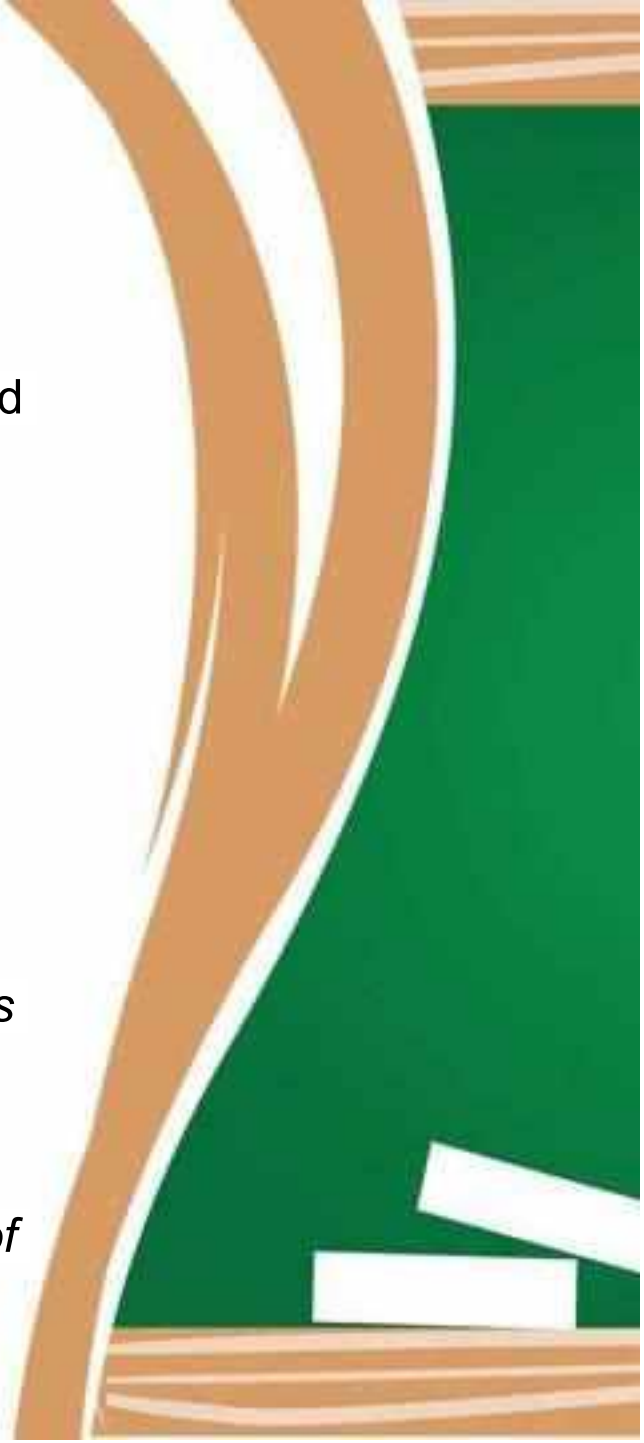
(3) Go through or work behind any primary strike line.

Assembly Bill No. 2404 (Lee)

The Assembly Committee on Public Employment and Retirement noted:

"The provisions of the current bill before the committee are identical to Assembly Bill 504 [] as vetoed by the Governor who intimated that:

> *Unfortunately, th[i]s bill is overly broad in scope and impact. The bill has the potential to seriously disrupt or even halt the delivery of critical public services, particularly in places where public services are co-located. This could have significant, negative impacts on a variety of government functions including academic operations for students, provision of services in rural communities where co-location of government agencies is common, and accessibility of a variety of safety net programs for millions of Californians.*"



Assembly Bill No. 2889 (Zbur)

Section 1. Section 3509 of the Government Code is amended to read:

…

(e)(2)

… in an action involving the City of Los Angeles or the County of Los Angeles, the board has exclusive initial jurisdiction over a request for injunctive relief that seeks to enjoin organization by employees or employee activity that is arguably protected or prohibited by this chapter, including, but not limited to, a strike.

Assembly Bill No. 2889 (Zbur)

Section 2.

…

The board is uniquely experienced in assessing complex labor disputes and their impact on the public, and has a dedicated staff of attorneys to study the parties' submissions in light of previous experience, precedent, and competing interests. Neither the employee relations commission of the City of Los Angeles nor of the County of Los Angeles have access to the same enforcement resources as the board, where unlike the board, neither are budgeted for, nor maintain, an office of the general counsel nor do they have any full-time attorneys assigned to them.